92-1601

No. 92-1683

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,
EX REL. ROLAND A. LEBLANC,

Petitioner,

v.

RAYTHEON COMPANY, INC.,

Respondent

Petition For Writ of Certiorari To The United States Courts of Appeals For The First Circuit

Peter W. Adler
Law Offices of Peter W. Adler
Five Commonwealth Road
Natick, Massachusetts 01760
(508) 650-0055

QUESTIONS PRESENTED

1. Did the Massachusetts courts properly dismiss this action (and its predecessor), or should the dismissals be vacated?

2. Must or should the Massachusetts courts take jurisdiction of this action (and its predecessor)?

3. If the Massachusetts courts lack jurisdiction, must or should they transfer this action (and its predecessor) back to Florida?

*Petitioner's counsel has timely applied for admission to the Bar of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....vi-vii

JURISDICTION.....viii

STATUTORY PROVISIONS INVOLVED.....ix-xii

STATEMENT OF THE CASE.....1

A. The Facts.....1

B. *LeBlanc I* (Massachusetts).....2

C. *LeBlanc II* (Florida).....5

D. *LeBlanc II* (Massachusetts).....7

REASONS FOR GRANTING THE WRIT.....9

I. PETITIONER HAS A RIGHT TO PROCEED...10
FLORIDA, WHERE JURISDICTION HAS BEEN FOUND
TO LIE, IF MASSACHUSETTS COURTS INDEED
LACK JURISDICTION

A. Jurisdiction Lies in Florida.....11

B. Massachusetts Courts Abused.....12
Their Discretion By Failing to Transfer
the Cases to Florida On Their Own
Initiative

C. Florida Must Hear *LeBlanc II* If It..14
Cannot Be Brought in Massachusetts

II. BOTH ACTIONS WERE IMPROPERLY
DISMISSED, FOR MANY REASONS, AND THEY
SHOULD BE REINSTATED.....16

A. The Statutory Prerequisites to Dismissal Were Ignored.....16

B. Numerous and Gross Procedural.....18 Errors Render the Dismissal Void

1. Raytheon Procured Transfer from.....18 Florida by Falsely Consenting to Jurisdiction in Massachusetts. Upon Transfer, It Brazenly Argued the Opposite.

2. No Motion to Dismiss Could Have.....20 Been Decided Because None Was Pending

C. The Dismissal Denied LeBlanc's.....23 Constitution Right to Due Process

III. RES JUDICATA AND COLLATERAL.....24 ESTOPPEL DO NOT BAR PROSECUTION IN MASSACHUSETTS. THE FALSE CLAIMS ACT, THE PUBLIC INTEREST, JUSTICE AND CONVENIENCE REQUIRE THAT PETITIONER'S CLAIM OF MASSIVE FRAUD AGAINST THE GOVERNMENT BE TRIED, IN MASSACHUSETTS

A. *Res Judicata* and Collateral.....24 Estoppel Can Not Apply to the Many New Claims of Fraud in *LeBlanc II*

B. Massachusetts Courts Cannot Violate.27 the Clear Statutory Directive to Hear These Fraud Claims; The Contrary Decision Lacks Preclusive Effect

C. The Massachusetts Courts Were Not...30 Bound by *Res Judicata* and Collateral Estoppel. They Should Have Considered the Uniformity of Other Circuits on This Pure Question of Statutory

Law; Congress's Intent and the Public's Need to Combat Fraud; Fairness; the Fact That Raytheon Was Never Even Served; and Convenience

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

CBN Corp. v. United States, 364 F.2d 393 (19--).....32

McLoutn Steer Corp. v. Jewell Coal & Coke Co., Inc., D.D. Tenn. 1976, 432 F. Supp. 10.....15

Miller v. Hambrick, 905 F.2d 259 (9th Cir. 1990).....13

Phillips Petroleum Co. v. FEA, D.C. Del. 1977, 435 F. Supp. 1234.....15

United States ex rel. Stinson v. Blue Cross, 755 F. Supp. 1040 (S.D.Ga. 1990)

U.S. ex rel. Hagood, 929 F.2d 1416 (9th Cir. 1991).....3

U.S. Ex Rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991).....5

OTHER AUTHORITIES

Wright, Miller & Cooper, Federal Practice and Procedure §§ 3845, 4415, 4425, 4428 (1976).....19,25,34

Restatement 2d of Judgments (1981) § 12 & com. c.....34

OPINIONS BELOW

1. *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 729 F. Supp. 170 (D. Mass.) (February 6, 1990) ("LeBlanc I"). Dismissed without prejudice at Plaintiff's request for lack of subject matter jurisdiction. Appendices A-D.

2. *Id.*, 913 F.2d 17 (1st Cir.) (September 4, 1990). Dismissal affirmed, on other grounds. Appendix E.

3. 111 S. Ct. 1312 (1991). Cert. denied, March 18, 1991.

4. 112 S. Ct. 17 (1991), rehearing denied, August 2, 1991.

5. *United States ex rel. LeBlanc v. Raytheon Co., Inc.* ("LeBlanc II"), United States District Court for the Middle District of Florida, Orlando Division. Granted jurisdiction; transferred to Massachusetts. Appendices F-G.

6. *Id.*, United States District Court

for the District of Massachusetts (May 15, 1992). Appendix H.

7. *Id.*, Order of Dismissal (May 18, 1992). Appendix I.

8. United States Court of Appeals (1st Cir.)(December 29, 1992). Appendix J.

JURISDICTION

Petitioner commenced this action in Florida for the United States under the False Claims Act, 31 U.S.C. § 3730(b)(1). He alleged that Raytheon has perpetrated massive fraud upon the United Stated in violation of 31 U.S.C. § 3729. Subject matter jurisdiction lies under 31 U.S.C. § 3732 and 28 U.S.C. § 1331.

Jurisdiction and venue were initially obtained in Florida where Raytheon maintains a facility. In its motion to transfer, Raytheon stipulated to jurisdiction in Massachusetts.

Appellate jurisdiction on appealwas based upon 28 U.S.C. § 1294.

That Court entered judgment on December 29, 1992. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1331, 1355 and 3730(b)(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, **in the interest of justice**, a district court **may transfer any civil action** to **any other district or division where it might have been brought.**

28 U.S.C. § 1631. **Transfer to cure want of jurisdiction**

Whenever a civil action is filed in a court ... and that **court finds** that there is a **want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought** at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

The False Claims Act, 31 U.S.C. § 3730, provides in relevant part:

(b)(1) **A person** may bring a civil action for a violation of section 3729 **for the person** and for the United States Government. The action shall be brought in the name of the Government.

The action may be dismissed only if the court and the Attorney General

give written consent to the dismissal and their reasons for consenting. (e) Certain actions barred. --
(1) **No court shall have jurisdiction** over an action brought **by a** former or present **member of the armed forces** under subsection (b) of this section **against a member of the armed forces** arising out of such person's service in the armed forces.

(4)(A) **No court shall have jurisdiction** over an action under this section based upon the public disclosure of allegations or transactions **in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media**, unless the action is brought by the Attorney General or **the person** bringing the action **is an original source of the information.**

(B) ... "original source" means **an individual** who has **direct and independent knowledge** of the information on which the allegations are based **and has voluntarily provided the information to the Government** before filing an action under this section which is based on the information.

Fed. R. Civ. P. Rule 12(b) [T]he following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted ....

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. Rule 56(c) **Motion** and Proceedings Thereon. **The motion shall be served** at least **10 days before the time fixed** for **the hearing.** The adverse party **prior to the day of hearing may serve opposing affidavits....** the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, **shall if practicable ascertain what material facts exist** without substantial controversy and what material facts are actually and in good faith controverted.

Fed. R. Civ. P. Rule 54(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When ... multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon ... an express direction for the entry of judgment. In the absence of such determination and direction, **any order or other form of decision, however designated, which adjudicates**

fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and **the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

(emphasis added)

F.R.C.P. Rule 6(d).....22

F.R.C.P. Rule 7(b)(1).....22

F.R.C.P. Rule 12(b)(6)...6,7,22,23,24

F.R.C.P. Rule 41(b).....11

F.R.C.P. Rule 54(b).....17

F.R.C.P. Rule 60.....16

Supreme Court Rule 10.1(a).....9

Massachusetts Local Rule 5.....22

STATEMENT OF THE CASE

A. The Facts

Petitioner Roland LeBlanc worked in 1986 and 1987 for the United States Government, Defense Contract Administration Services ("DCAS"). As a Quality Assurance Specialist at Raytheon's Waltham, Massachusetts plant, during and after work hours, he discovered and investigated pervasive and massive military contract fraud.

LeBlanc alleges that Raytheon: sold nonconforming products, including a high percentage of inadequate Class A (critical) welds, many now on use in navy vessels; used nonconforming materials and methods (e.g., instead of required high temperature baking, spray painting equipment on the way out the door); failed to test properly or at all, faked test results and falsified records; did

unauthorized repairs (e.g., realigning metal with torches, weakening it); billed for products never ordered; and billed for huge quantities of product which was never delivered but simply disappeared from the plant.

Mr. LeBlanc disclosed his findings to his superiors, who told him to keep quiet, and covered the matter up. When Mr. LeBlanc disclosed his findings to more senior officials, within hours he was summarily fired. Documentation shows that Raytheon played a role in the termination.

B. *LeBlanc I* (Massachusetts)

Seeing the Government take no action, Mr. LeBlanc brought suit for himself and on behalf of the United States under the False Claims Act in Massachusetts ("LeBlanc I"). The Complaint alleges many frauds with the required particularity, and supporting exhibits are attached.

Your Petitioner believes his False Claims Act case is the largest ever brought in the history of the country, **involving the potential recovery of billions of dollars** (excluding treble damages). The Justice Department told him and undersigned counsel that it knows the claims have merit.

Nonetheless the Government declined to intervene. At the time, it opposed all False Claims Act suits brought by its employees, notwithstanding that 1986 amendments to the False Claims Act, **removed a bar to claims by Government employees.** One perceptive court stated,

> "The United States has neither case law nor legislative history to support its extraordinary reading of a remarkably explicit jurisdictional statute. The United States takes its position in surprise and chagrin at the 1986 amendments" but should direct its complaints to Congress.

U.S. ex rel. Hagood, 929 F.2d 1416 (9th Cir. 1991). Without right, United States

attorneys wrote a lengthy brief contending that as a former Government employee Mr. LeBlanc lacked jurisdiction. (Having declined to intervene under 31 U.S.C. § 3730(b)(4)(B), the Government was barred from submitting the brief, and the Court should have disregarded it). The Justice Department made like arguments in other qui tam cases, applying Byzantine logic that most courts readily perceived to contradict the statute's limited jurisdictional exceptions. (While arguing that courts lacked jurisdiction, the Justice Department took the contrary position in a letter to then-Vice President Quayle, requesting that the law be changed retroactively to block like LeBlanc's from proceeding around the country).

The District Court adopted the Government's arguments that LeBlanc lacked

subject matter jurisdiction in dicta, but allowed LeBlanc to serve Raytheon, thereby acknowledging jurisdiction. Appendices A-B. It then amended its order, however, to dismiss, **without prejudice**, for lack of jurisdiction. Appendices C-D. The court did not comply with statutory requirements for dismissal; failed to adjudicate the rights of both LeBlanc and the United States; and did not consider transferring the action elsewhere.

The Court of Appeals affirmed on more limited jurisdictional grounds, and *certiorari* was denied. Appendix E.

C. *LeBlanc II* (Florida)

The Eleventh Circuit in *U.S. Ex Rel. Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991)*, expressly stated that the Massachusetts courts improperly denied jurisdiction over Mr. LeBlanc's case. As was his right, *see infra*, LeBlanc filed a

second suit in Orlando, Florida, where Raytheon has a plant. The second action incorporates the first but alleges many more and many new counts of fraud. Mr. LeBlanc spent a great deal of time as a private citizen investigating and preparing these additional claims.

The Florida Court acknowledged jurisdiction and authorized LeBlanc to serve Raytheon. See Appendix F. Raytheon moved to dismiss under F.R.C.P.12(b)(6) **or alternatively** to transfer to Massachusetts for reasons of convenience. **Raytheon stipulated to the District Court Judge to the existence of jurisdiction in Massachusetts.** She declined to rule on the 12(b)(6) motion but allowed the alternative motion to transfer to Massachusetts, over Petitioner's objection, for *forum non conveniens*. Appendix G. The Court did not ascertain

that jurisdiction would lie in the transferee state. Mr. LeBlanc sought rehearing immediately but was told the file was gone, barring appeal under Florida rules.

D. *LeBlanc II* (Massachusetts)

Upon arrival, Raytheon filed a **"Motion for Status Conference"** "to address the procedural posture of this case" and "to determine the most efficient manner in which to proceed". No hearing date was set and LeBlanc had no notice of any pending motion except that one. Three days later, without a hearing (at least on LeBlanc's part), Judge Tauro gave notice that he had allowed a Rule 12(b)(6) motion to dismiss (failure to state a claim). Appendices H-I. Dismissal was in fact on grounds of *res judicata* and collateral estoppel as to lack of jurisdiction in Massachusetts.

In his opinion, the judge confessed to being overwhelmed and confused by the number of counts and references to military specifications violated (which are central to the case). He did not carefully compare the claims in the two suits, disregarded LeBlanc's allegations as to the personal time spent preparing *LeBlanc II*, and did not analyze the jurisdictional consequences. He said he was bound by the prior decision despite contrary decisions elsewhere.

As before, the District Court did not obtain the Attorney General's consent, adjudicate the Government's rights, or consider transfer back to Florida from whence if had come solely for convenience of the parties only three days before.

The First Circuit affirmed on the same grounds in a short opinion, Appendix J, giving rising to this appeal.

REASONS FOR GRANTING THE WRIT

Intervention by this Court is urgently required and warranted. (1) The claim of multibillion dollar fraud against the United States is one of great national importance and Congress has legislated that it wants such claims prosecuted, not ignored. (2) The circuits are in conflict in general and within this very case on an important question of federal jurisdiction under the False Claims Act. (3) The courts have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by lower courts, as to call for an exercise of this Court's power of supervision." (S.Ct. Rule 10.1(a)). (4) Moreover, this dispute, involving two actions in two states, can be easily and quickly resolved or resolved at all only by recourse to the Supreme Court.

On any analysis LeBlanc may prosecute his second action. Jurisdiction has already been found to lie in Florida. He may proceed there unless the Massachusetts courts take jurisdiction, as they should do. See Section I.

The dismissal of *LeBlanc II* as *res judicata* also brings *LeBlanc I* properly before this Court. Both cases were improperly dismissed and should be reinstated. See Section II. Petitioner should be permitted to proceed with both cases in Massachusetts. See Section III.

I. PETITIONER HAS A RIGHT TO PROCEED IN FLORIDA, WHERE JURISDICTION HAS BEEN FOUND TO LIE, IF MASSACHUSETTS COURTS INDEED LACK JURISDICTION

Even assuming in this Section I that Petitioner lacks jurisdiction in Massachusetts, he may prosecute this second action (and its predecessor) in Florida.

A. Jurisdiction Lies in Florida

The decision by a court of one state, here Massachusetts, that it lacks jurisdiction, has no effect on the existence of jurisdiction in another state. LeBlanc had every right to take his claims to a state where they would be heard. It was not "forum shopping" but common sense to go to a court that would hear his claims.

The District Court for the District of Massachusetts dismissed *LeBlanc I and II* on grounds of lack of subject matter jurisdiction in Massachusetts. Not being expressly "with prejudice", both dismissals were without prejudice. F.R.C.P. Rule 41(b). A case dismissed without prejudice may be brought at any time in the same state or any other. A case dismissed without prejudice **for lack of jurisdiction in Massachusetts** cannot

under any circumstances bar a like suit in a different state. Jurisdictional decisions in one state, here Massachusetts, bind no other.

The foregoing needs no arguing because the Florida District court took jurisdiction and allowed LeBlanc to serve Raytheon. The case was transferred only for *forum non conveniens*. The prior and subsequent jurisdictional decisions in Massachusetts have no bearing whatsoever on the jurisdiction the Florida court exercised in *LeBlanc II*.

B. Massachusetts Courts Abused Their Discretion By Failing to Transfer the Cases to Florida On Their Own Initiative

The Florida Court transferred *LeBlanc II* to Massachusetts **to be heard on the merits** in the most convenient forum, not to be declared dead upon arrival. If the case cannot be heard, obviously it must be returned.

By statute, wherever either case began, the Massachusetts courts should (if they lack jurisdiction) on their own initiative transfer them to Florida. 28 U.S.C. § 1631:

> "[If a] court finds that there is a want of jurisdiction, the court **shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought"**

(emphasis added). The statute is obligatory. The Massachusetts courts erred by the complete failure to consider transfer, and to transfer in the interest of justice. This is so even barring a request for transfer. See, e.g., *Miller v. Hambrick*, 905 F.2d 259 (9th Cir. 1990):

> 28 U.S.C. § 1631 ... 'serves to "aid litigants who were confused about the proper forum for review."' [N]ormally dismissal of an action that could be brought elsewhere is 'time consuming and justice-defeating'. ... Although Miller did not move the district court to transfer the case, we have held that '[a] motion to transfer is unnecessary because of the mandatory

cast of section 1631's instructions.'...We review a district court's refusal to transfer a case under 1631 for an abuse of discretion. **A district court's failure to exercise discretion constitutes an abuse of discretion. Here, the district court abused it discretion in failing to determine whether the action could have been brought** [elsewhere] and whether transfer would have been in the interest of justice....Accordingly **we reverse the district court's dismissal of Miller's petition and remain the case to the district court with directions to transfer the petition to the District Court for the Norther District of Texas."**

C. Florida Must Hear *LeBlanc II* If It Cannot Be Brought in Massachusetts

The result would be the same even if Massachusetts courts properly denied jurisdiction and had no obligation to transfer to a state that does. In that

event, the Florida Court improperly transferred *LeBlanc II* to Massachusetts.

Pursuant to 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A court has the power to transfer only if the plaintiff has **an unqualified right to bring the actions in the transferee forum at the time of commencement of the actions".** *Phillips Petroleum Co. v. FEA*, D.C. Del. 1977, 435 F. Supp. 1234. A district where plaintiff's action "might have been brought" within subsection (a) authorizing transfer **is one where subject matter jurisdiction is present.** *McLoutn Steer Corp. v. Jewell Coal & Coke Co., Inc.*, D.D. Tenn. 1976, 432 F. Supp. 10.

The Appeals Court has only recently

affirmed the ruling that Massachusetts courts have no jurisdiction to hear *LeBlanc II*. Barring reversal by the Supreme Court, or relief from judgment under F.R.C.P. Rule 60 in the Massachusetts courts, it will have been determined that transfer to Massachusetts was improper, requiring transfer back to Florida.

II. BOTH ACTIONS WERE IMPROPERLY DISMISSED, FOR MANY REASONS, AND THEY SHOULD BE REINSTATED

A. The Statutory Prerequisites to Dismissal Were Ignored

The False Claims Act, 31 U.S.C. § 3730(b)(1) prohibits dismissal without the written consent of the Attorney General with reasons for consenting. The statutory prerequisite was not met in either action. The Justice Department had even reminded the District Court in *LeBlanc I* of this obligation in its Notice of Declination of Appearance on April 21,

1989:

> Although the United States has declined to enter its appearance in this action, the Court is respectfully referred to 31 U.S.C. § 3730(b)(1), which provides that the relator may carry on the action in the name of the United States, but that the '**action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.**' Therefore, the United States respectfully requests that the Court solicit the consent of the United States ... **before ruling on any proposal, either by the relator or the defendant, to dismiss, settle, or otherwise discontinue the action.**

Moreover, every dismissal by Massachusetts courts has been invalid for violation of F.R.C.P. 54(b). This Rule, in brief, provides that where multiple parties are involved, here Mr. LeBlanc and the United States, a court may not enter a final order as to one but fewer than all of the claims and parties.

> **"[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not**

> **terminate the action as to any of the claims or parties**, and **the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

Accordingly, both Massachusetts cases have been improperly dismissed, the dismissals are void and a nullity, LeBlanc's rights have not been finally determined, and this Court should reinstate both actions.

B. Numerous and Gross Procedural Errors and Misrepresentations Render the Dismissal Void

In addition, there have been numerous and flagrant procedural errors and abnormalities, and Raytheon made misrepresentations, which have extremely prejudiced the Petitioner and require reversal.

1. Raytheon Procured Transfer from Florida by Falsely Consenting to Jurisdiction in Massachusetts. Upon Transfer, It Brazenly Argued the Opposite

For example, Raytheon stipulated in

Florida to the existence of jurisdiction in Massachusetts. In its motion to dismiss or alternatively to transfer, filed March 3, 1992, Raytheon stated,

> "Transfer pursuant to section 1401(a) also **requires a determination that the case might have been brought in the transferee district.** Garay, 755 F. Supp. at 1011. This requirement is satisfied if: "(1) **the court had jurisdiction over the subject matter of the action;** (2) venue is proper there; and (3) the **defendant is amenable to process issuing out of the transferee court."** Windmere, 617 F. Supp. at 10, citing 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3845 (1976). **Each of these elements is present here.** first, **the District of Massachusetts had federal question jurisdiction over the federal False Claims Act claims.** Second venue was proper [in Massachusetts]. Third, **Raytheon is amenable to process in the District of Massachusetts."**

Quite simply, Raytheon procured the transfer from Florida by fraud. Accordingly, this Court should nullify the transfer unless jurisdiction is found in Massachusetts.

Upon transfer Raytheon defrauded the

Massachusetts courts. Raytheon failed to disclose in Massachusetts its amenability to process. Moreover, in requesting a status conference Raytheon suggested *sub silentio* the very opposite (which was also untrue), the "pendency" of a motion to dismiss.

2. No Motion to Dismiss Could Have Been Decided Because None Was Pending

As stated, on May 11, 1992 Raytheon filed a "Motion for Status Conference". The document repeatedly requests only **the scheduling of a status conference**, to address the procedural posture of the recently transferred case and "to determine the most efficient manner in which to proceed". Undeniably, the motion is a request for conference and not more. It does allege "the pendency of Raytheon's Motion to Dismiss and the fact that this action is related to the prior lawsuit resolved by Judge Tauro", but again, in

the context of a request to schedule a conference to determine how to proceed.

Astoundingly, a scant four days later the District Court allowed Raytheon's purported Motion to Dismiss under Rule 12(b)(6). This was clear error.

First, Raytheon had moved for a status conference only, notwithstanding the reference to a pending motion.

Second, in no event was any Motion to Dismiss pending. The only such motion had been the motion in Florida to dismiss **or in the alternative to transfer**. The alternative had been granted, leaving no motion pending, even in Florida.

Third, not only was the Motion to Dismiss filed in Florida, but it concerned the jurisdictional status of the case in Florida, not in Massachusetts. Notice and an opportunity to be heard on the Florida motion would not constitute sufficient

notice and opportunity to defend a like motion in Massachusetts, applying Massachusetts law.

Fourth, no motion could have been effective in Massachusetts without the required filing, notice, time to respond, and hearing date. See, e.g., F.R.C.P. Rule 7(b)(1):

> "An application to the court for an order shall be by motion which ... shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief sought... (3) All motions shall be signed in accordance with Rule 11." Local Rule 5(a), Massachusetts Rules of Court: [E]very ... written motion [unless ex parte] and similar paper shall be served upon each of the parties. F.R.C.P. Rule 6(d): "A written motion ... and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing ... When a motion is supported by affidavit, the affidavit shall be served with the motion."

The Florida motion, had it been before the Massachusetts court, was a motion to dismiss under Rule 12(b)(6)

(failure to state a claim). If ever a right to relief was stated on the face of a False Claims Act complaint, it was in *LeBlanc II*.

Notwithstanding that the motion (assuming that it was before the court) was under Rule 12(b)(6), failure to state claim, the judge dismissed the case on grounds of *res judicata* and collateral estoppel. Such grounds were not properly raised or noticed by a Rule 12(b)(6) motion for failure to state a claim.

C. The Dismissal Denied LeBlanc's Constitutional Right to Due Process

LeBlanc had no reason to believe that any motion was properly pending against him in the United States District Court except the one that was pending, namely Raytheon's Motion for a Status Conference, containing a request to confer and consider how to proceed. He received no notice of a motion to dismiss under Rule

12(b)(6) in Massachusetts. Even had he it would not have constituted notice to defend against a challenge on grounds of *res judicata* and collateral estoppel. He was denied due process and an opportunity to defend, and dismissal should be reversed.

III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR PROSECUTION IN MASSACHUSETTS. THE FALSE CLAIMS ACT, THE PUBLIC INTEREST, JUSTICE AND CONVENIENCE REQUIRE THAT PETITIONER'S CLAIMS OF MASSIVE FRAUD AGAINST THE GOVERNMENT BE TRIED, IN MASSACHUSETTS

Ignoring every statutory, procedural, constitutional and ethical consideration raised above, was Judge Mazzone compelled as he thought to find jurisdiction precluded in *LeBlanc II* by reason of that finding in *LeBlanc I*? The facts and law suggest otherwise.

A. *Res Judicata* and Collateral Estoppel Can Not Apply to the Many New Claims of Fraud in *LeBlanc II*

Issue preclusion arises in a second

action on the basis of a prior decision only when the same issue is involved in both actions and the issue was actually litigated in the first, after a full and fair opportunity to litigate. 18 Wright, Miller & Cooper, § 4415 at 136. All claims in Mr. LeBlanc's first action are included in the second. However the second contains more new allegations of fraud than repetitions from the first action. The first Complaint, for example, had twenty-five claims while the second has ninety-two. The False Claims Act specifies that each false claim gives rise to a separate cause of action and right of recovery, including penalties. The preponderance of new claims requires a fresh and thorough jurisdictional analysis.

Further, a key consideration in the First Circuit's conclusion that he lacked

jurisdiction in *LeBlanc I* was that "[i]t was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer - the government."

As a legal matter, the False Claims Act contains no bar to recovery by a government employee obliged to uncover fraud. As a factual matter, it was not Mr. LeBlanc's responsibility to uncover fraud. He was, simply, a Quality Assurance Specialist. The first action clearly should not have been barred.

But even considering that it was, **those consideration do not apply to the second action.** Mr. LeBlanc had **no responsibility whatsoever** to devote countless hours of his personal time to uncover anything on behalf of the Government. He has a right to prosecute and share in the recovery from those

extraordinary private efforts.

B. Massachusetts Courts Cannot Violate the Clear Statutory Directive to Hear These Fraud Claims; Contrary Decisions Have No Preclusive Effect

Only valid decisions can have preclusive effect. 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4415 at 136. Other circuits have expressly stated that Mr. LeBlanc had a right under the clear wording of the False Claims Act to proceed in Massachusetts. The District Court did not merely mistakenly interpret the law in *LeBlanc I*, but failed to follow clear statutory directives. Thus, the denial of jurisdiction in *LeBlanc I* was void and a nullity and without preclusive effect. To reach the same decision a second time would be to disregard the statute again and compound the error. It would be particularly egregious in light of decisions saying *LeBlanc I* ignored clear

statutory authority.

It would also be highly discriminatory. Mr. LeBlanc knows of no other government employee whose False Claims Act has ever been barred, and his is certainly among the most deserving.

The analysis is simple as set forth in *U.S. ex rel. Williams, supra*. *Williams* notes that 1943 amendments barred government employees from bringing suit. In 1986 to encourage qui tam suits, Congress **eliminated** the language prohibiting suit based on information possessed by the government. Instead it granted any private "person" the right to bring a civil action, subject to four specific and limited exceptions.

The District Court's ruling in the first action that government employees could never bring suit was clearly wrong. They do not fall within the enumerated

exceptions of § 3730(e). Moreover, § 3730(e)(1) bars certain government employees from certain qui tam suits, making clear that such employees may generally proceed.

The District Court also found that there had been "public disclosure" of allegations under § 3730(e)(4)(A), disclosure by LeBlanc-as-government-employee to LeBlanc-as-private-citizen.

The First Circuit said this "cannot be" and held that there was no "public disclosure". Subsection (4)(A) states, **"No court shall have jurisdiction .. based upon the public disclosure of allegations** [in limited enumerated circumstances']." At that moment, the First Circuit was obliged to acknowledge jurisdiction. See *Williams*:

> **"[W]e explicitly reject the reasoning of the First Circuit in [LeBlanc I]."** "In our view the *Raytheon* court **went one step too far** [i.e., beyond its

> authority]. Once it found no 'public disclosure,' its inquiry should have ended and **jurisdiction should have been acknowledged.** The application of the 'original source' exception to the jurisdictional bar in order to defeat jurisdiction that already existed, **was improper."**

(Even had there been public disclosure, LeBlanc as an original source qualified for the exception).

C. The Massachusetts Courts Were Not Bound by *Res Judicata* and Collateral Estoppel. They Should Have Considered The Uniformity of Other Circuits on this Pure Question of Statutory Law; Congress's Intent and the Public's Need to Combat Fraud; Fairness; the Fact That Raytheon Was Never Even Served; and Convenience

Judge Mazzone in *LeBlanc II* found the prior ruling binding on the court despite any contrary decisions by [many] other circuits. (P. 5, citing 18 Wright, Miller & Cooper, Federal Practice and Procedure §4415 at 130 (1981)). But as stated, a void ruling has no preclusive effect. Moreover, numerous exceptions to preclusion directly apply here.

United States ex rel. Stinson v. Blue Cross, 755 F. Supp. 1040 (S.D.Ga. 1990), concerned the same False Claims Act provisions as *LeBlanc*. Defendant contended jurisdiction was barred in Georgia because plaintiff failed to obtain subject matter jurisdiction on the same claim against a similar defendant in New Jersey. The court found otherwise. It said that issue preclusion is less favored in pure questions of law than with mixed questions of law and fact. Further, **"Issue preclusion is least favored where the pure question of law is one of statutory construction"**. *Id.* at 1046. "[T]he court will not estop the plaintiff from invoking the subject-matter jurisdiction of this Court ... [T]he issue urged to be precluded" -- subject matter jurisdiction under the same Section 3730(e)(4) as in *LeBlanc* -- "is a pristine

question of law". *Id.*

> Further, "[e]ven if preclusion is generally accepted for identical issues of law application, **changes in the surrounding legal climate may often defeat preclusion ...** Similar changes may result from **decisional developments.**" Moreover, "[s]o long as there has been sufficient change to suggest that a new issue of law application is presented, preclusion should be defeated unless there are compelling concerns of repose or reliance." Wright & Miller, *supra*, § 4425 at 259-61. This is all the more so when decisional changes in the legal climate are "clear and sharp .... Development of the law in factually related cases may have the same effect. **Mere general growth of a body of law may defeat preclusion.**" *Id.* at 262. **"[T]he second court should be freed from the prior determination if there has been some marked advance or alteration in relevant orientation, approach, reasoning or principles."** *Id.* at 262, citing CBN Corp. v. United States, 364 F.2d 393, 395-98.

Other important concerns must be but were not considered in LeBlanc's case:

> "[I]nconsistent rulings may defeat preclusion on issues of law application because of **special needs to achieve nondiscriminatory treatment.** Subtler changes may justify relitigation in other areas, ... because of competing or **even**

> **greater concerns of public interest ... broad public interests may ease the way to reconsideration ... special needs** [may be] **presented by specific areas of law ....**" *Id.* at 262-63.

Congress identified fraud against the government as a matter of great national importance. Congress acknowledged a compelling need to encourage citizens to root out fraud.

Preclusion also "should not be exercised in such manner as to work an injustice." *Id.* at 264-65. Justice is something Mr. LeBlanc has yet to see. A further injustice will be done if only his second suit is reinstated, because he might thereby be denied the right to prosecute two years of fraud claims.

Raytheon should be estopped from asserting preclusion because of its misrepresentations to the courts.

Finally, the Court is reminded that *LeBlanc I* was voluntarily dismissed,

without prejudice, and Raytheon was never a party, whereas preclusion applies only to parties.

> [A] substantial change in the applicable legal context may warrant relitigation of jurisdictional issues ... **This principle is clearly sound as to relitigation of the same issue with respect to the same claim if the first action was dismissed for want of jurisdiction.**

Wright & Miller § 4428 at 278, citing Restatement 2d of Judgments (1981) § 12 & com. c.

Considerations of repose for military giant Raytheon by reason of "prior litigation", when the parties were never joined in *LeBlanc I* are non-existent.

Had the District Court properly weighed and applied these standards, it would have been compelled to conclude that jurisdiction was clearly appropriate in Massachusetts despite the earlier, contrary ruling.

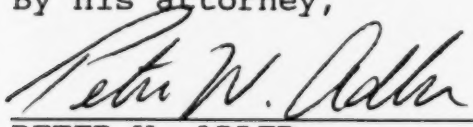
CONCLUSION

WHEREFORE your Petitioner respectfully prays that this Supreme Court vacate the dismissals of *LeBlanc I and II* in Massachusetts; direct that jurisdiction lies in Massachusetts and Petitioner may prosecute both actions there, as it is the most convenient forum; otherwise, order both cases transferred to Florida for prosecution.

Respectfully submitted,

ROLAND A. LEBLANC

By his attorney,



PETER W. ADLER
LAW OFFICES OF PETER W. ADLER
Five Commonwealth Road
Natick, Massachusetts 01760
(508) 650-0055

March 27, 1993

(3)

92-1683

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

No. 92-1683

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,
EX REL. ROLAND A. LEBLANC,

Petitioner,

v.

RAYTHEON COMPANY, INC.,

Respondent

APPENDIX TO

Petition For Writ of Certiorari To The United States Courts of Appeals For The First Circuit

---

Peter W. Adler
Law Offices of Peter W. Adler
Five Commonwealth Road
Natick, Massachusetts 01760
(508) 650-0055

79 pp

Table of Contents.

Table of Authorities Cited.....iii

Cases.....iii-vi

United States Constitution.....vi

United States Statutory Provisions.....vii

Federal Rules of Civil Procedure.....vii

Executive Orders.....vii

Congressional Records.....vii

Additional Authorities.....viii

Appendices

Appendix A - Order, U.S.D.C., D. Mass. (January 25, 1990)(Tauro, J.).....1

Appendix B - Memorandum (same date).....2

Appendix C - Amended Order (February 6, 1990).....29

Appendix D - Errata Sheet, U.S.D.C., D. Mass.)(February 6, 1990).....31

Appendix E - Memorandum, U.S. Court of Appeals (1st Cir.)(September 4, 1990)...32

Appendix F - Order, U.S.D.C., Middle District of Florida, Orlando Div.....45

Appendix G - Order (same date).....47

Appendix H - Memorandum and Order, U.S.D.C. (D. Mass.)(May 15, 1992).....56

Appendix I - Order of Dismissal (May 18, 1992).....67

Appendix J - Entry of Judgment, U.S. Court of Appeals (1st Cir.)(December 29, 1992)68

Table of Authorities Cited

CASES

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461 (1937).....9

Cheeseman v. Carey, 485 F.Supp. 203, 215 (S.D.N.Y.), remanded on other grounds, 623 F.2d 1387 (2d Cir. 1980).....54

Christian v. Emison, 303 F.2d 52, 54-55 (5th Cir. 1962), cert. denied, 371 U.S. 920 (1962).....65

Citizens Mortgage Corp. v. Investors Mortgage Insurance Co., 706 F.Supp. 819, 823-24 (M.D.Fla. 1989).....50

Colonial Penn Group, Inc. v. Colonial Deposit Co., 834 F.2d.....12

Cortez v. First City National Bank of Houston, 735 F.Supp. 1021, 1023 (M.D.Fla. 1990).....50

Diamond, et al. v. Charles, 476 U.S. 54, 61, 106 S.Ct. 1697 (1986).....5

Dowd v. Society of St. Columbans, 861 F.2d 761, 763 (1st Cir. 1988).....63

Eccles v. Peoples Bank, 333 U.S. 426, 434, 68 S.Ct. 641 (1948).....10

Erickson v. American Institute of Bio. Sciences, 716 F. Supp. 908 (E.D.Va. 1989).....3, 17, 19, 20, 22, 25, 37-38, 40

Fagot v. Federal Deposit Insurance Corp., 584 F. Supp. 1168, 1179 (D.P.R. 1984)....9

Garay v. BRK Electronics, 755 F.Supp. 1010 (M.D.Fla. 1991).....49, 52

Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970).....51

Hendrix v. Poonai, 662 F.2d 719 (11th Cir. 1981).....11

Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660 (1982).....7, 35

Greenfield and Montague Transp. Area v. Donovan, 758 F.2d 22 (1st Cir. 1985).....13

Hardison v. Alexander, 655 F.2d 1 (1st Cir. 1983).....64

Hardison v. Alexander, 655 F.2d 1281 (D.C. Cir. 1981).....64

Harrington v. Garland, 551 F.Supp 1371 (D. Me. 1982), aff'd, 715 F.2d 1 (1st Cir. 1983).....64

Harrington v. Vandalia-Butler Bd. of Education, 649 F.2d 434 (6th Cir. 1981).....65

Jackson v. DeSoto Parish School Board, 585 F.2d 726 (5th Cir. 1978).....65

Jaffree v. Wallace, 837 F.2d 1461 (11th Cir. 1988).....66

LeBlanc v. United States, 111 S. Ct. 1312 (1991).....58-59

Los Angeles v. Lyons, 461 U.S. 95 (1982).....35

M & M Transportation Co. v. U.S. Industries, Inc., 416 F. Supp. 865 (S.D.N.Y. 1976).....12

Maryland Casualty Co. v. Pacific Oil Co., 312 U.S. 270 (1941).....8

NLRB V. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir. 1987).....63

Precision Air Parts Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985).....64-65

Public Service Commission v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236 (1952).....14

Schmid Laboratories, Inc. v. Hartford Accident and Indemnity Co., 654 F.Supp. 734 (D.D.C. 1986).....54

Skelly Oil v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876 (1950).....12

Stafford v. Briggs, 444 U.S. 527, 535, 100 S.Ct. 774 (1980).....23

Thomas v. Union Carbide Agricultural Products, Co., 473 U.S. 568, 105 S.Ct. 3325 (1985).....7-9

United States ex rel. LaValley v. First National Bank of Boston, 707 F. Supp. 1351, (D.Mass. 1988).....10, 17, 26

United States ex rel. LeBlanc v. Raytheon Co. (D. Mass. May 15, 1992).....67

United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943).....24-25

United States ex rel. McCans v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956), aff'd, 254 F.2d 90, cert. denied, 358 U.S. 834 (1958).....37

United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984)..17

United States of America, ex rel. Roland A. LeBlanc v. Raytheon Company, Inc., 729 F. Supp. 170 (D. Mass. 1990).....29, 56

United States v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987).....24

U.S. ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990).....57-58

U.S. ex rel. Stinson, et al. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247 (S.D.Fla. 1989).....22, 23

U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493 (**11th** Cir. 1991).....58

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1975).....5

Wilson v. Lynaugh, 878 F.2d 846 (5th Cir. 1989), cert. denied, 493 U.S. 969 (1989).....64

Windmere Corp. v. Remington Products, Inc., 617 F.Supp. 8 (S.D.Fla. 1985).....49, 51-52

UNITED STATES CONSTITUTION.

Article III.....5

UNITED STATES STATUTORY PROVISIONS.

28 U.S.C. § 1404(a).....48
31 U.S.C. § 3729 & et seq.....3, 30, 56
31 U.S.C. § 3730.....3, 14-15, 17, 19, 20
.....20, 34-35, 37-38, 41, 46
31 U.S.C.A. § 3730(e)(4).....15, 19-22
.....27-29, 38, 40, 42, 44

FEDERAL RULES OF CIVIL PROCEDURE.

F.R.C.P. Rule 8(a)(2).....60

F.R.C.P. Rule 12(b)(6).....56

F.R.C.P. Rule 57.....12

EXECUTIVE ORDERS

Exec. Order No. 11222, 30 Fed. Reg. 6469 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 4385. Additionally, Title 18 U.S.C.A. § 208(a) (West Supp. 1989) ...25

CONGRESSIONAL RECORDS

S. Rep. No. 99-345, 99th United States Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 5266-67, 5288-89.....9, 36-37

132 Cong. Rec. S11244.....23

Letter of Attorney General Biddle, reprinted in H.R. Rep. No. 263, 78th Cong. 1st Sess. 2 (1943).....16

ADDITIONAL AUTHORITIES

6A Moore's Federal Practice ¶ 57.12 (2d ed. 1989).....11

W. Blackstone, Commentaries on the Law of England 160 (1768).....3, 37

18 Wright, Miller & Cooper, Federal Practice and Procedure §4415 (1981).....65

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
ex rel. Roland A. LeBlanc,
Plaintiff,

CA No. 88-2363-T

v.

Raytheon Company, Inc.,
Defendant.

ORDER

January 25, 1990

TAURO, D.J.

For the reasons stated in the accompanying memorandum, plaintiff-relator LeBlanc's Motion To Strike United States' Reservation Of Rights is hereby DENIED.

The requirement that the complaint in this case remain under seal, imposed by 31 U.S.C. §3730(b), is hereby removed.

/s/ J. Tauro
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
ex rel. Roland A. LeBlanc,
Plaintiff,

CA No. 88-2363-T

v.

Raytheon Company, Inc.,
Defendant.

MEMORANDUM

January 25, 1990

TAURO, D.J.

Plaintiff, Roland LeBlanc, is a former Quality Assurance Specialist of the United States Government Defense Contract Administrative Service ("DCAS"). While so employed, he was stationed for eleven months at the Waltham, Massachusetts plant of defendant Raytheon Company, Inc. ("Raytheon"). There, LeBlanc allegedly observed several violations by Raytheon employees in their handling of government

contracts. He reported these violations to his superiors at DCAS, and appropriate actions were taken.

In October 1988, eleven months after he was terminated by DCAS, LeBlanc brought this qui tam(1) action in the name of the United States, pursuant to the Federal False Claims Act,(2) to recover damages and civil penalties for Raytheon's alleged frauds against the United States. Under the False Claims Act, a qui tam suit must

---

(1) "Qui tam" comes from a longer Latin phrase meaning "who brings the action for the king as well as himself." See Erickson v. American Institute of Bio. Sciences, 716 F. Supp. 908, 909, n.1 (E.D.Va. 1989) citing W. Blackstone, Commentaries on the Law of England 160 (1768). A qui tam action is an action brought by an informer, pursuant to a statute, where a portion of the recovery goes to the informer and the remainder goes to the state. Id.

(2)Title 31 U.S.C.A. §3729 et seq.(West Supp. 1989).

first be served on the United States, rather than the defendant. It is filed in camera, where it remains under seal for at least sixty days. 31 U.S.C.A. §3730(b)(2) (West Supp. 1989). Within those sixty days, the government has the option to intervene and take over the prosecution of the case. Id. If the government chooses to intervene, it becomes the primary responsible party, although the qui tam plaintiff, also known as the "relator," U.S.C.A. §3730(c)(1) (West Supp. 1989). If the government chooses not to intervene, the relator then has the right to proceed with the case on his own with the hope of recovering a portion of any consequent damages and penalties. 31 U.S.C.A. §§37370(c)(3) and (d)(2) (West Supp. 1989).

LeBlanc properly filed his suit with the government. The government ultimately

chose not to intervene. But, in its Declination of Appearance, the government reserved "the right to object to the relator's right under 31 U.S.C. §3730(d) to recover, if successful, a percentage of the proceeds from the prosecution of this action." United States' Notice of Declination of Appearance, p. 2.

Presently at issue is LeBlanc's motion to strike the Government's reservation of the right to object to LeBlanc's recovery of proceeds. In support of his motion, LeBlanc argues that the recent revisions to the False Claims Act authorize his recovery of proceeds, regardless of his former status as a government employee. The government opposes the motion to strike, arguing that: 1) the motion is premature, rendering any court decision here a mere advisory opinion; and 2) the False Claims

Act does not authorize government employees to file qui tam suits based solely on information obtained in the course of government employment.

I

The first issue to be addressed is whether this case presents a live "case or controversy" such that jurisdiction would be proper under Article III of the Constitution. See Diamond, et al. v. Charles, 476 U.S. 54, 61, 106 S.Ct. 1697 (1986) ("Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.'"); Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204 (1975) (justiciable case or controversy is a jurisdictional prerequisite). The government argues that, because it is not clear that the government will ever exercise its right to object to LeBlanc's recovery, the

issue of whether LeBlanc is entitled to any proceeds is not a ripe "case" or "controversy." LeBlanc unfortunately fails to address this argument, and it is one that is ultimately dispositive.

The government has not officially object to LeBlanc's recovery of proceeds from the proposed qui tam suit. It has merely reserved its right to do so. Where, as here, the challenged conduct is only threatened, "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Los Angeles v. Lyons, 461 U.S. 95, 101-2, 103 S.Ct. 1660 (1982). See also, Thomas v. Union Carbide Agricultural Products, Co., 473 U.S. 568,

580, 105 S.Ct. 3325 (1985) (ripeness doctrine prevents courts from "premature adjudication" of "abstract disagreements"). The determination as to whether a threat is sufficiently immediate to warrant a finding of jurisdiction is to be made by analyzing the underlying factual circumstances.(3)

There are three critical uncertainties that permeate the situation here. First, it is not clear that LeBlanc will even proceed with the suit. Second, it is problematical as to whether he will be successful if he does proceed. Third, it is an open question as to whether the government will object to LeBlanc's recovery, should he successfully prosecute the suit. In light of these several

---

(3) Maryland Casualty Co. v. Pacific Oil Co., 312 U.S. 270, 273 (1941).

contingencies, the possible threat of a government objection is not sufficiently real and immediate to justify this court's jurisdiction.(4) The special circumstances of this case do not warrant a more permissive standard of ripeness analysis. Of course, the refusal of jurisdiction here may frustrate the purpose of the False Claims Act's qui tam provisions, which is to provide financial incentives that will encourage the exposure of frauds against the government.

---

(4) See Fagot v. Federal Deposit Insurance Corp., 584 F. Supp. 1168, 1179 (D.P.R. 1984) ("[T]he alleged controversy cannot be based upon the possibility of a factual situation that may never develop."). See also Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-81, 105 S.Ct. 3325 (1985) (case not ripe where claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all."); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461 (1937) (courts should avoid issuing an "opinion advising what law would be upon a hypothetical state of facts."). Cf.

See United States ex rel. LaValley v. First National Bank of Boston, 707 F. Supp. 1351, 1355 (D.Mass. 1988); S. Rep. No. 99-345, 99th See United States Cong., 2d Sess. 3-4, reprinted in 1986 U.S. Code Cong. & Admin. News 5266-67. Faced with the possibility that the government might later object to his recovery of proceeds, a relator, like LeBlanc, may choose not to chance the costs of prosecution, because there would be no guarantee of a return on his investment. By holding that a relator may not establish his right to claim qui tam proceeds until the government actually objects to his recovery, this court may arguably chill the incentives that the

---

Eccles v. Peoples Bank, 333 U.S. 426, 434, 68 S.Ct. 641 (1948) ("Where administrative intention is expressed but has not yet come to fruition . . . we have held that the controversy is not yet ripe for equitable intervention.").

False Claims Act sought to create. But, where the requirements of ripeness are not satisfied, jurisdiction may not be presumed merely because resolution of the substantive issue might advance a worthwhile policy goal. In another context, the Eleventh Circuit has stated:

> Needless to say, the decision makers would benefit greatly by having guidance as to the potential legal ramifications of their decisions. Furnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts.

Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981).(5)

Finally, it can also be argued that, rather than seeking coercive relief prematurely, LeBlanc's motion is, in fact, a request for a declaration that he is authorized to proceed under the False

(5) See also, 6A Moore's Federal Practice ¶ 57.12 (2d ed. 1989)("[T]he requirements of justiciability are not met if the

Claims Act. "[W]hen coercive relief only is sought but is deemed ungrantable or inappropriate, the court may sua sponte, if it serves a useful purpose, grant instead a declaration of rights." Fed.R.Civ.P. 57 (Declaratory Judgments), advisory committee's note.

This argument, however, falls prey to the same problems of ripeness noted above. Declaratory relief is one of a range of remedies available to a litigant. But, an independent basis for federal court jurisdiction must be established before a litigant is entitled to declaratory relief. See Skelly Oil v. Phillips Petroleum Co., 339 U.S. 667, 671-72, 70 S.Ct. 876 (1950); Colonial Penn Group, Inc. v. Colonial Deposit Co., 834 F.2d

---

complainant merely alleges that he 'is at a loss to know what course to pursue.'") quoting M & M Transportation Co. v. U.S. Industries, Inc., 416 F. Supp. 865 (S.D.N.Y. 1976).

229, 232 (1st Cir. 1987) ("Federal jurisdiction does not lie simply because relief is requested under the federal Declaratory Judgment Act").

Moreover, when a plaintiff relies on a request for declaratory relief to engage in a preemptive strike against threatened action by the declaratory defendant, the "well-pleaded complaint rule" applies. Greenfield and Montague Transp. Area v. Donovan, 758 F.2d 22, 26 (1st Cir. 1985). The rule, in this context, requires that:

> [W]here the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened . . . action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.

Greenfield and Montague at 26-7, citing

Public Service Commission v. Wycoff Co., 344 U.S. 237, 248, 73 S.Ct. 236 (1952).

LeBlanc's motion is, in effect, an effort to put in play his defense to the government's threat of objection to his recovery. The government's threat, therefore, and not LeBlanc's request, must provide the basis for jurisdiction. And, as has already been noted, the government's threat depends upon the occurrence of too many contingencies to make it a live "case or controversy." Even if we cast LeBlanc's motion as a request for declaratory relief, therefore, there is no ripe controversy that would provide jurisdiction.

Accordingly, as LeBlanc's motion does not present an actual "case" or "controversy," it must be denied.

II

Even if LeBlanc's motion does present

an actual "case or controversy," it must be denied on the merits. The False Claims Act bars qui tam suits by former government employees, based upon information they acquired in the course of their government employment.

Prior to 1986, the False Claims Act prohibited former government employees from bringing qui tam suits based on information acquired during the course of their government employment.(6) The False Claims Act was substantially amended in 1986(7), however, and its qui tam provisions were revised.(8) In its

---

(6)The pre-1986 version of 31 U.S.C. §3730(d) provided that courts had no jurisdiction over qui tam suits "based on evidence or information the Government had when the action was brought." See former 31 U.S.C.A. §3730(b)(4) (West 1983). That jurisdictional bar was included in the False Claims Act in 1943, in order to stem the tide of "parasitical actions" in which former government employees would base their litigation on information already

present form, the False Claims Act provides, in relevant part:

> **(e) Certain actions barred . . .**
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.
>
> 31 U.S.C.A. §3730(e)(4) (West Supp. 1989).

---

secured by the government in the regular course of law enforcement." See letter of Attorney General Biddle, reprinted in H.R. Rep. No. 263, 78th Cong. 1st Sess. 2 (1943). One of Congress's concerns at that time was that qui tam suits might induce government employees to investigate claims with an eye toward remuneration

Only one case, Erickson, ex rel. United States v, American Institute of Biological Sciences, 716 F. Supp. 908 (E.D.Va. 1989), has addressed the issue of whether the 1986 amendments to the False Claims Act removed the jurisdictional bar against government employees.(9) The court in Erickson concluded that, although

over and above that provided by their jobs. Erickson, ex rel. United States v. American Inst. of Bio. Sciences, 716 F. Supp. 908. 816, n. 18 (E.D.Va. 1989).
(7)False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).
(8) The government concedes that the 1986 amendments came about because the jurisdictional bar was too broad. For example, the pre-1986 provisions prohibited suits by "honest informers" such as: 1) those who had independent information of fraud, which the government also happened to possess, and 2) "original sources" who gave the information to the government, but then found themselves barred by the very submission because, "at the time the suit was brought," the government possessed the information. See United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984); United States ex rel. LaValley v. First National Bank of Boston, 707 F. Supp 1351, 1355 (D.Mass. 1988).

the False Claims Act, as amended, does not expressly address this question, the language, structure, legislative history,, and purpose of the amendments reveal a legislative intend to permit government employees to sue under the False Claims. 716 F. Supp. at 918.

The court notes that the amended statute permits any "person" to sue, unless he falls into one of four specifically excluded groups.(10) It concluded that the qui tam plaintiff there under facts similar to the case at bar,(11) did not fall into any of the four excluded groups. Id. at 914. According

(9)The government cites one other case which held, according to the government, that government employees are still barred from suing under the False Claims Act. Because that case remains under seal, however, this court cannot properly consider it.

(10)Title 31 U.S.C. §3730(e) specifically bars the following four groups of suits: 1) suits between members of the military (§3730(e)(1)); 2) suits against members of

to Erickson, not even §3730(e)(4) excluded the relator, because he was the "original source" of the information. Id.(12)

This court agrees with the conclusion in Erickson that the Act was specifically amended to allow all persons to sue, unless they fall into §3730(e)'s four excluded classes. But this court disagrees with Erickson's determination

---

of Congress, the Judiciary, or senior Executive officials if the action is based on evidence or information known to the government when the action was brought (§3730(e)(2)); 3) suits based on allegations which are the subject of a civil suit in which the government is already a party (§3730(e)(3)); and 4) suits based on the public disclosure of allegations in a public proceeding, unless the person suing is the original source of the information. (§3730(e)(4)). See supra for full text of §3730(e)(4).

(11)Erickson worked for a State Department Agency, and his job was to ensure that a private laboratory's contract with the agency was properly administered. Erickson discovered violations of the contract and reported the misconduct directly to his supervisor. When the agency for which he worked declined to pursue the matter, he filed a qui tam suit.

that government employees are not excludedunder the terms of the statute. Government employees are excluded by §3730(e)(4) of the False Claims Act. That section prohibits suits based on the "public disclosure" of government information. 31 U.S.C.A. §3730(e)(4) (West Supp. 1989). Because government employees maintain a dual status -- arms of the government while at work, private citizens while not at work -- a "public disclosure" necessarily occurs whenever a government employee uses government information he learned on the job to file

(12) The Erickson court drew further support from the FFCA's "whistleblower" provision, §3730(h), in which the definition of "employer" was intended to include public as well as private entities. Id. at 914. The court derived from this the implication that government employees are specifically included in the class of people Congress desires to have aid in enforcement of the anti-fraud laws generally.

a qui tam suit in his private capacity.(13)

Moreover, a former government employee like LeBlanc cannot quality for the "original source" exception to §3730(e)(4)'s jurisdictional bar. An "original source" is defined in the statute as:

> . . . an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. §3730(e)(4)(B) (West Supp. 1989). LeBlanc was not someone with "independent knowledge of the information." Rather he was a government employee whose responsibility it was to uncover such information. Because gaining the information was required of him as a condition of his employment, the fruits of his effort belong to his employer --

the government. For purposes of the proferred information, the government and LeBlanc were indistinguishable, as opposed to individual entities. Given his status, LeBlanc did not provide information to the government "voluntarily," under the terms of the statute. Rather, he reported the information to the government in response to the obligations of his employment.

The interpretation of §3730(e)(4) followed here is consistent with Congressional intent.(14) The "original source doctrine" was designed to bridge Congress' competing goals of preventing opportunistic lawsuits while at the same time encouraging the disclosure of information otherwise unavailable to the government. See U.S. ex rel. Stinson, et al. v. Provident Life & Accident Ins. Co.,

(13)This argument was not addressed in the Erickson case.

721 F. Supp. 1247, 1250 (S.D.Fla. 1989) citing 132 Cong. Rec. S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley).

A lawsuit by a former government employee based on information he obtained soley [sic] through his employment can fairly be construed as "opportunistic." The relator in such a context would profit from information already obtained at the taxpayer's expense. In other words, permitting former government employees to bring qui tam actions based upon information they discovered on the job would allow them to be paid twice for the same work. That is not what Congress had in mind.(15)

---

(14)The ambiguity of terms of art such as "public disclosure" and "original source" requires that the terms be construed in light of the objects and policies of the statute as a whole. See Stafford v. Briggs, 444 U.S. 527, 535, 100 S.Ct. 774 (1980) (courts should look, beyond literal

Cf. United States ex rel. Marcus v. Hess, 317 U.S. 537, 560, 63 S.Ct. 379 (1943) (Jackson, J., dissenting).(16)

A bar to suits by government employees,

---

use of terms, to objects and policies o statute as a whole); United States v. McGoff, 831 F.2d 1071, 1078 (D.C. Cir. 1987) ("The settled approach for interpreting [terms of art] is . . . not one emphasizing ordinary meaning.").

(15)Indeed, permitting government employees to bring such qui tam suits would contravene other official expressions of the policy against "opportunism." For example, President Johnson issued an executive order in 1965 which provided:

> Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or obtained through their employment . .
>
> Sec. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

employees, present or former, is consistent with the balance of goals that the "original source doctrine" sought to achieve. While Congress intended to expand the class of eligible relators, it maintained its interest in preventing parasitical suits primarily relying upon, information government employee based on frauds which add nothing to the enforcement of anti-

---

Exec. Order No. 11222, 30 Fed. Reg. 6469 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News 4385. Additionally, Title 18 U.S.C.A. § 208(a) (West Supp. 1989) imposes criminal penalties upon any employee who "participates personally and substantially as a Government officer or employee, through . . . investigation . . . in . . . [any] particular matter in which, to his knowledge, he . . . has a financial interest . . . ." While neither of these examples is directly applicable, they serve to reinforce the government's policy against the opportunistic uses of government information.

(16)At the heart of the government's arguments is the concern that permitting government employees to sue will result in unseemly races to the courthouse between government employees and the government,

fraud laws.(17) A suit brought by a

and may discourage government employees from furthering investigations of fraud for fear of losing control over information on which a suit may be brought.

These same concerns were raised by Justice Jackson in his dissent in United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943). In construing the original 1863 False Claims Act, the majority of the Marcus Court concluded that, not only did the Act permit suits by "any person", but "even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer." 317 U.S. at 546. Justice Jackson criticized the majority, saying:

> To accept the view . . . that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one . . . . If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

Id. at 560.

Indeed, the 1943 amendment creating a blanket exclusion for government employees was passed largely in response to the majority's conclusion in Marcus. See Erickson at 915-16; U.S. ex rel. LaValley v. First Nat. Bank of Boston, 707 F. Supp. 1351, 1354 (D.Mass. 1988).

the enforcement process.(18) To be consistent with Congress' intent, §3730(e)(4) must be interpreted to ban all qui tam suits based on government information, unless the individual bringing the suit acquired his knowledge

(continued)

---

(18)In the case of the private relator, the government's enforcement is enhanced, at the outset. Even though a suit after the private relator has disclosed the information pursuant to §3730(e)(4) adds nothing new to the government's body of information, the initial disclosure of the information did add something. The government obtained information that it did not have before, because the individual had no prior obligation to turn over his information to the government. Conversely, at no point in the qui tam proceeding does a government employee add to the government's body of information. In his capacity as a government employee, the relator was acting as an arm of the government. When he discovered the fraud in the course of his employment, therefore, it was the government that discovered the fraud. His subsequent "voluntary" disclosure pursuant to §3730(e)(4), therefore, adds nothing to what the government already knew.

of the fraud in his private capacity.(19) Qui tam suits, such as LeBlanc's, that are based upon information discovered in the course of government employment, therefore, are barred.

An order will issue.

/s/ J. Tauro
United States District Court

---

(19)For example, the "original source" exception in §3730(e)(4) contemplates a situation in which a private citizen discovers a fraud, reports it to government authorities, and the information is somehow public disclosed. Notwithstanding the public disclosure, the private individual may still maintain his suit because he, as a private citizen, originally discovered the fraud.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
ex rel. Roland A. LeBlanc,
Plaintiff,

CA No. 88-2363-T

v.

Raytheon Company, Inc.,
Defendant.

AMENDED ORDER

February 6, 1990

TAURO, D.J.

For the reasons stated in United States of America, ex rel. Roland A. LeBlanc v. Raytheon Company, Inc., CA No. 88-2363-T (D. Mass. Jan. 25, 1990((memorandum) (Tauro, J.), plaintiff-relator LeBlanc's Motion To Strike United States' Reservation Of Rights is hereby DENIED for failure to present an actual "case or controversy."

Alternatively, because this qui tam suit is jurisdictionally barred by §3730(e)(4) of the Federal False Claims

Act, 31 U.S.C. §3729 et seq., this action is hereby DISMISSED.

IT IS SO ORDERED.

/s/ J. Tauro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America,
ex rel. Roland A. LeBlanc,
Plaintiff,

CA No. 88-2363-T

v.

Raytheon Company, Inc.,
Defendant.

ERRATA SHEET

February 6, 1990

To all counsel:

Please be advised that the memorandum dated January 25, 1990 has been amended as follows:

The first sentence of Section II, paragraph one, page 8 now reads:

> Even if LeBlanc's motion does not present an actual "case or controversy," his qui tam complaint must be dismissed.

/s/ J. Tauro
United States District

United States Court of Appeals
For the First Circuit

No. 90-1246

UNITED STATES OF AMERICA
ex rel. ROLAND A. LEBLANC
Plaintiff-Relator, Appellant

v.

RAYTHEON COMPANY, INC.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Bownes, Senior Circuit Judge,
and Cyr, Circuit Judge.

James C. Heigham, with whom Francisca D. Morant, Choate, Hall & Stewart, Charles B. Molineaux and Dempsey, Bastianelli, Brown & Touhey, were on brief for appellant.

Michael F. Hertz, Civil Division, U.S. Department of Justice, Stuart M. Gerson, Assistant Attorney General and Wayne A. Budd, United States Attorney, were on brief for appellee.

September 4, 1990

TORRUELLA, Circuit Judge. This is an appeal from an order entered by the United States District Court for the District of Massachusetts dismissing for lack of jurisdiction a qui tam action brought under the False Claims Act, 31 U.S.C. § 3729 et seq., by Roland A. LeBlanc (appellant) against Raytheon Company, Inc. (appellee). Although we agree with the result reached by the district court, we find its reasoning overly broad and conclusive.

I. FACTS

Roland LeBlanc filed this lawsuit on October 21, 1988 under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1988). LeBlanc's complaint alleged that, during his employment as a Quality Assurance Specialist for the united States Government Defense Contract Administrative

Service ("DCAS"), he observed fraud in the handling of government contracts by the defendant Raytheon Company, Inc. ("Raytheon").

Under the False Claims Act, a qui tam action must first be served on the United States, rather than on a defendant. It is filed in camera, where it remains under seal for at least sixty days. 31 U.S.C.A. § 3730(b)(2). Within those sixty days, the government has the option to intervene and take over the prosecution of the case. Id. If the government chooses to intervene, it becomes the primarily responsible party, although the qui tam plaintiff, also known as the "relator," may still continue as a party. 31 U.S.C.A. § 3730(c)(1). If the government chooses not to intervene, the relator then has the right to proceed with the case on his own, with the hope of recovering a

portion of any consequent damages and penalties. 31 U.S.C.A ¶¶ 3730(c)(3) and (d)(2). When declining to appear, the government may reserve the right to object to the relator's right under 31 U.S.C.A. § 3730(d) to recover, if successful, a percentage of the proceeds from the prosecution of the action.

LeBlanc properly filed his suit with the government. The government ultimately chose not to intervene, but filed a reservation of the right to collect if LeBlanc should prevail. Below, LeBlanc moved to strike the government's reservation. The district court dismissed the motion, holding that it was premature in that it did not present a live case or controversy. With this we agree. Since the government has not officially objected to LeBlanc's recovery of proceeds from the proposed qui tam suit, the challenged

conduct is only threatened, not actual. We will not decide an issue that is merely conjectural or hypothetical. Los Angeles v. Lyons, 461 U.S. 95, 101-2 (1982). However, the district court went on to hold that qui tam actions by government employees are excluded by the False Claims Act. Here, we disagree. Although we do agree that Roland LeBlanc's action is excluded, as discussed below, not all qui tam actions brought by government employees are excluded by the False Claims Act.

II. DISCUSSION

From 1943 to 1986, government employees were effectively prohibited from bringing qui tam actions by the False Claims Act.(1) In 1986, Congress amended the statute to "encourage more private enforcement suits." S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24, reprinted in

1986 U.S. Code Cong. & Admin. News 5288-89. This case turns on the meaning of the 1986 amendment to the qui tam(2) provisions of the False Claims Act. Basically, Congress broadened the universe of potential plaintiffs, with only four

---

(1) Before its amendment in 1986, 31 U.S.C. § 3730 effectively prohibited both current and former government employees from bringing qui tam actions based on information acquired while a government employee. United States ex rel. McCans v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956) (per curiam), aff'd, 254 F.2d 90, cert. denied, 358 U.S. 834 (1958). The pre-1986 version of 31 U.S.C. § 3730(d) had provided that courts had no jurisdiction over qui tam actions "based on evidence or information the Government had when the action was brought."

(2)"Qui tam" comes from the Latin phrase "who brings the action for the king as well as himself." See Erickson v. American Institute of Bio. Sciences, 716 F. Supp. 908, 909 n.1 (E.D.Va. 1989) (citing W. Blackstone, Commentaries on the Law of England, 160 (1768)). By statute a qui tam action allows an informer to become a "private attorney general" with a portion of the recovery going to the informer and the remainder to the state.

exclusions. At issue here is whether or not government employees fall under one of those exclusions, § 3730(e)(4), and are still barred from bringing suits under the Act. The False Claims Act provides in relevant part:

> (3) Certain actions barred . . .
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4).

Erickson, ex rel. United States v.

American Institute of Bio. Sciences, 716 F. Supp. 908 (E.D. Va. 1989), the only case to discuss the issue of whether government employees can bring qui tam actions after the 1986 amendments, held that the language structure, legislative history and purpose of the 1986 amendments reveal a legislative intent to permit such actions. The Erickson court reasoned that since § 3730(b) states that any "person may bring a civil action," and because nowhere in the statute are there restrictions on the term "persons," Congress intended that "Government employees are included in the general universe of permissible qui tam plaintiffs unless, in the particular circumstances, they fall into one of the four specifically excluded groups." Id. at 913. Erickson went on to hold that government employees did not fall into the

exclusion of § 3730(e)(4), which is also the exclusion at issue in this case.

The district court, while agreeing with Erickson that the False Claims Act was specifically amended to broaden the scope of permissible plaintiffs, concluded that government employees did indeed constitute an excluded group under ¶ 3730(e)(4) and thus are barred from bringing qui tam actions. The district court found that because "government employees maintain a dual status - arms of the government while at work, private citizens while not at work - a 'public disclosure' necessarily occurs whenever a government employee uses government information he learned on the job to file a qui tam suit in his private capacity. Furthermore, the district court went on to conclude that all government employees are barred under the original source exception of § 3730(e)(4) as well.

The district court need not have gone so far. For this reason we take this opportunity to clarify and limit the district court's holding and analysis.

A. PUBLIC DISCLOSURE

The district court's analysis of the "public disclosure" provision effectively erases a large portion of § 3730(3)(e)(4). We disagree with the district court's analysis for three reasons. First, the logical reading is that the subsection serves to prohibit courts from hearing qui tam actions based on information made available to the public during the course of a government hearing, investigation or audit or from the news media. It bars government employees, as well as private citizens, from bringing qui tam actions only if the information forming the basis of the action was acquired in the circumstances described in 31 U.S.C. §

3730(e)(4)(A). It does not prevent government employees from bringing qui tam actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation or audit or through the news media.

Second, the district court's analysis of the subsection requires the assumption that government employees lead schizophrenic lives and can publicly disclose information to themselves. Even were this hypothesis physically reasonable, it totally ignores the limiting language in § 3730(e)(4)(A) which follows the term "public disclosure." That language bars jurisdiction over actions "based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or

Government Account Office report, hearing, audit, or investigation, or from the news media . . ." It does not deny jurisdiction over actions based on disclosures other than those specified, contrary to what the district court seemed to maintain.

Last, the district court further assumes that the filing of a qui tam action is itself a public disclosure." This cannot be. Such an action is filed under seal without service on anyone other than the United States and remains non-public until the district court enters an order lifting the seal. To hold otherwise would be to render each and every filing a "public disclosure," thus barring all qui tam actions.

B. ORIGINAL SOURCE

The district court held that a government employee in the same position

as LeBlanc cannot quality for the "original source" exception to § 3730(e)(4)'s jurisdictional bar. We agree. It was responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer - the government. Thus, LeBlanc was not someone with "independent knowledge of the information" as required by the statute. This conclusion, however, does not mean that there is no government employee who could qualify to bring a qui tam action under the original source exception. We decline to draft a litigation manual full of scenarios that would fall under the exception. Suffice it to say that we limit our holding to the facts.

Affirmed in result.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA ex rel.
ROLAND A. LEBLANC,

Plaintiff,

v. CASE NO. 91-440-CIV-ORL-19

RAYTHEON COMPANY, INC.,

Defendant.

ORDER

This case is considered by the Court upon the Government's Notice of Declination (Doc. No. 24, filed December 16, 1991) and Qui Tam Plaintiff's Motion to Remove Seal and for Leave to Serve Defendant and Memorandum in Support thereof (Doc. Nos. 26 and 27, filed December 27, 1991).

The Government has filed notice that it declines to proceed against this Defendant in the action initiated against Defendant Raytheon by qui tam Plaintiff LeBlanc. Pursuant to 31 U.S.C. §

3730(b)(4)(B), the qui tam Plaintiff has the right to proceed with the action. Therefore, the Court **GRANTS** Qui Tam Plaintiff's Motion to Remove Seal and for Leave to Serve Defendant (Doc. No. 26). In accordance with the Government's request, the Court further directs that qui tam Plaintiff serve upon the Government copies of all pleadings filed in this action. 31 U.S.C. § 3730c)(3).

DONE AND ORDERED AT Orlando, Florida, this 30th day of January, 1992.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA ex rel.
ROLAND A. LEBLANC,

Plaintiff,

v. CASE NO. 91-440-CIV-ORL-19

RAYTHEON COMPANY, INC.,

Defendant

ORDER

This case is before the Court upon Defendant's Motion to Dismiss Complaint or, Alternatively, to Transfer this Matter to the District of Massachusetts and Memorandum in Support thereof (Doc. Nos. 30 and 31, filed March 4, 1992) and Plaintiff's Response in Opposition to Plaintiff's Motion to Dismiss or to Transfer (Doc. No. 38, filed March 27, 1992).

Defendant moves to transfer this action to the District of Massachusetts

pursuant to 28 U.S.C. §1404(a). Defendant contends that the District of Massachusetts is a much more convenient forum for this action and that none of the operative facts alleged in the Complaint relate in any way to the Middle District of Florida. Plaintiff argues that Defendant has failed to demonstrate that the balance of convenience weighs strongly in favor of the proposed transferee court. In addition, Plaintiff maintains that a transfer is premature because the parties have not had sufficient opportunity to obtain facts relevant to the convenience of these respective forums.

Title 28, United States Code, Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The burden of proof rests with the moving party, who must make a convincing showing of the right to transfer. Garay v. BRK Electronics, 755 F.Supp. 1010, 1011 (M.D.Fla. 1991). The plaintiff's choice of forum typically will not be disturbed unless the balance of convenience strongly favors the transfer. Id. Any number of factors are relevant to this determination, including: (1) convenience of the parties; (2) convenience of the witnesses; (3) relative ease of access to sources of proof; (4) availability of process to compel presence of unwilling witnesses; (5) cost of obtaining presence of witnesses; and (6) the public interest. Id.; Windmere Corp. v. Remington Products, Inc., 617 F.Supp. 8, 10 (S.D.Fla. 1985). The decision ultimately is committed to the court's sound discretion. Cortez v.

First City National Bank of Houston, 735 F.Supp. 1021, 1023 (M.D.Fla. 1990); Citizens Mortgage Corp. v. Investors Mortgage Insurance Co., 706 F.Supp. 819, 823-24 (M.D.Fla. 1989).

It is evident from the Complaint and the affidavit of John P. Booth that the connection between the subject matter of this lawsuit and the Middle District of Florida is virtually nonexistent. Plaintiff has failed to identify any relationship between his claims and this District other than the fact that Defendant does business here. All of the claims are based on Plaintiff's observations of allegedly fraudulent or improper conduct that took place at Defendant's production facility in Waltham, Massachusetts. In addition, Defendant maintains its corporate headquarters in Lexington, Massachusetts.

Consequently, witnesses, documents and physical evidence are likely to be concentrated in and around Massachusetts. There is no indication that any witnesses or other sources of evidence are located in the Middle District of Florida. It will undoubtedly be easier and less expensive to obtain and present evidence concerning these claims if the case is transferred to the District of Massachusetts. Furthermore, Massachusetts will provide a more convenient forum not only for Defendant, but also for Plaintiff, who resides in Massachusetts, and for the likely witnesses.

Although a plaintiff's choice of forum is usually accorded substantial weight in determining whether to transfer venue, it is not controlling. Garner v. Wolfinbarger, 433 F.2d 117, 119 (5th Cir. 1970); Windmere, 617 F.Supp. at 10. When

the operative facts underlying the claims did not occur in the forum chosen by the plaintiff, the plaintiff's choice is entitled to less consideration. Garay, 755 F.Supp. at 1011; Windmere, 617 F.Supp. at 10. As discussed above, the Middle District of Florida lacks any meaningful relationship to the events that are the subject of the Complaint. Defendant has easily met its burden of showing that the District of Massachusetts is a more convenient forum and that a transfer to Massachusetts is in the interests of justice.

Plaintiff argues that the motion to transfer is premature because the parties have not had an opportunity to obtain all the facts bearing upon the convenience of this forum. The allegations of the Complaint demonstrate that the Middle District of Florida has no connection to

the subject matter of this lawsuit. This inescapable conclusion is further supported by the affidavit of John P. Booth. Plaintiff, on the other hand, despite having submitted a 205-page Complaint detailing ninety-two separate claims, is apparently unable to identify any relationship between the claims and the middle District of Florida. His contention that additional time is needed to obtain such facts in this regard is unpersuasive.

Finally, Plaintiff suggests that Defendant has put itself in the "uncomfortable position" of arguing that the District of Massachusetts has subject matter jurisdiction over this case despite a prior ruling to the contrary in a related case. Plaintiff does not argue, however, that transfer is improper because the case could not have been brought in

the District of Massachusetts. Indeed, Plaintiff attempts to avoid collateral estoppel on this issue through his assertion that this case involves different issues concerning subject matter jurisdiction. Furthermore, the requirement that a case transferred only to a district where "it could have been brought" should not operate to allow a plaintiff to avoid specific precedents or rulings by "shopping" among different forums for the application of some particular view of the law. Cf. Schmid Laboratories, Inc. v. Hartford Accident and Indemnity Co., 654 F.Supp. 734, 737 (D.D.C. 1986); Cheeseman v. Carey, 485 F.Supp. 203, 215 (S.D.N.Y.), remanded on other grounds, 623 F.2d 1387 (2d Cir. 1980). Defendant's seemingly contradictory position is in reality a product Plaintiff's apparent attempt to

manipulate the court system through forum shopping and does not serve as grounds for preventing the transfer of this case to the appropriate forum.

For the foregoing reasons, Defendant's Motion to Transfer to the District of Massachusetts (Doc. No. 30) is **GRANTED.** This case is transferred to the United States District Court for the District of Massachusetts, the Court declines to rule on the alternative Motion to Dismiss.

DONE AND ORDERED AT Orlando, Florida this 21st day of April, 1992.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

UNITED STATED DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA ex rel.
ROLAND A. LeBLANC,
Plaintiff

92-10999-MA
Civil Action 91 440-CIV ORL-19

Vs.

RAYTHEON COMPANY,
Defendant

MEMORANDUM AND ORDER

Mazzone, D.J.
May 15, 1992

This matter is before me on the defendant's motion to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The case has followed a somewhat irregular course during its existence, marked by changes in fortune. This is but another step in the course, and a brief one on its way to a dispositive level. Some background follows.

On October 21, 1988, the plaintiff, Roland LeBlanc, filed a qui tam action in

the District of Massachusetts against Raytheon under the False Claims Act, 31 U.S.C. § 3729, et seq.. He claimed he obtained knowledge of false and fraudulent conduct by Raytheon on defense contracts when he worked as a quality assurance inspector at the Raytheon facility in Waltham, Massachusetts. He was employed at the time by the U.S. Defense Contract Administration Service.

That case was dismissed on the grounds that LeBlanc, as a government employee, was excluded from bringing a qui tam action under 31 U.S.C. §3729. U.S. ex rel. LeBlanc v. Raytheon Co., 729 F. Supp. 170 (D. Mass. 1990). On September 4, 1990, the First Circuit Court of Appeals affirmed the result below on the grounds that LeBlanc did not have the independent knowledge of the information required by the statute. U.S. ex rel. LeBlanc v.

Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990). Certiorari was denied on March 18, 1991. LeBlanc v. United States, 111 S. Ct. 1312 (1991).

At this point, the plaintiff's fortunes improved. On May 29, 1991, the Eleventh Circuit held that a government employee was not barred from bringing a qui tam action under the False Claims Act based on information he acquired in the course of his government employment, and explicitly rejected the reasoning of the First Circuit. U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1500, n.13, 1501 (**11th** Cir. 1991). Buoyed by this decision, LeBlanc sought leave to petition for rehearing before the Supreme Court, citing the Williams case. Not waiting for a decision on his motion for rehearing, LeBlanc filed this case in the Eleventh Circuit, specifically in the Middle

District of Florida, Orlando Division. The complaint, though now of gigantic proportions, is identical in all material respects to the complaint filed din 1988 in the District of Massachusetts. LeBlanc is still a resident of Natick, Massachusetts, but Florida jurisdiction is claimed on the basis of a Raytheon facility located on Sand Lake Road, Orlando, Florida.

On August 2, 1991, the Supreme Court denied the motion for leave to seek rehearing. LeBlanc v. United States, 112 S. Ct. 17 (1991). On April 21, 1992, the district court found the connection between the subject matter of the lawsuit and the Middle District of Florida virtually non existent and, over the opposition of the plaintiff, transferred the case to this Court. It was assigned to me pursuant to this Court's random

draw. Thus, the plaintiff's journey is back where it started in 1988, with few differences except, of course, for the intervening Eleventh Circuit decision in Williams.

A comparison of the two complaints is revealing. The first complaint is 55 pages long and contains 89 paragraphs. It was filed by Boston counsel and Washington counsel. The second complaint, filed pro se, is 205 pages long and contains 678 paragraphs. In apparent, and, as a pro se plaintiff, understandable ignorance of Fed. R. Civ. P. 8(a)(2) which calls for a short and plain statement of the claims, the plaintiff has dramatically increased his claims.1 For example, the alleged fraudulent conduct by Raytheon with regard to the Spot Welding Specifications yielded 7 claims in the first complaint. In the second complaint, the same conduct results

in 23 claims. Claims 29 through 30 deal with violations of the painting specifications, and so forth. In all, there are 16 separate categories of alleged fraudulent claims and 92 specific claims for relief within those categories. Attached to the complaint are 54 exhibits. Frankly, the complaint should be dismissed for failure to comply with Rule 8. It is verbose, confusing, overly technical, and contains complicated and endless references to technical bulletins, manuals and regulations. The complaint is simply overwhelming and completely unnecessary given the straightforward nature and purpose of the qui tam action.

Even more revealing are the few relevant additional allegations made by LeBlanc in the second complaint. In an apparent attempt to take advantage of the First Circuit's limitation in its decision

to the facts presented, LeBlanc adds allegations concerning additional hours and labor that he expended outside his job environment and requirements without compensation. This extra employment work occurred even after his termination and/or after the filing of the first complaint, and, therefore, compels a different analysis and result. Yet, to my review, every single one of the 54 exhibits attached to the complaint is signed by LeBlanc in his capacity as a government employee and other than his bald assertion, there is no support for these additional allegations.

On the basis of this entire record, including the record of the previous case, the defendant's motion to dismiss is allowed and the complaint dismissed. An extended analysis by this Court is not necessary. On this record the plaintiff

is barred by principles of both res judicata and collateral estoppel. A final judgment was obtained in the first case; the case was decided by a court of competent jurisdiction; the parties are identical; the causes of action are identical; and the plaintiff has had a full and fair opportunity to present his claims to the district court and the court of appeals in this circuit. Dowd v. Society of St. Columbans, 861 F.2d 761, 763 (1st Cir. 1988) (reviewing requirements of res judicata); NLRB V. Donna-Lee Sportswear Co., 836 F.2d 31, 34 (1st Cir. 1987) (reviewing requirements of collateral estoppel).

Plaintiff obviously attempts to take advantage of what he perceives as a change in the law. However, the prior ruling by the First Circuit is still valid and is therefore controlling in this case and

binding on this Court, despite any rulings to the contrary by other circuits. In addition, even if the law had changed, the ruling would still be binding on this Court.

> The general rule... throughout the nation is that changes in the law after a final judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled.

Precision Air Parts Inc. v. Avco Corp., 736 F.2d 1499, 1503-1504 (11th Cir. 1984), cert. denied, 469 U.S. 1191 (1985). E.g., Wilson v. Lynaugh, 878 F.2d 846, 850-851 (5th Cir. 1989), Ucert. denied, 493 U.S. 969 (1989); Harrington v. Garland, 551 F.Supp 1371, 1377 (D. Me. 1982), aff'd, 715 F.2d 1 (1st Cir. 1983); Hardison v. Alexander, 655 F.2d 1 (1st Cir. 1983); Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981). See also Harrington v. Vandalia-Butler Bd. of Education, 649 F.2d

434, 438 (6th Cir. 1981); 18 Wright, Miller & Cooper Federal Practice and Procedure §4415 at 130 (1981).

An exception to this rule exists with respect to major changes in the law involving "important, fundamental constitutional rights" when "public policy so demands." Precision, 736 F.2d at 1504. E.g., Jackson v. DeSoto Parish School Board, 585 F.2d 726, 729 (5th Cir. 1978) (holding no res judicata with respect to change in the constitutional rights regarding re-apportionment process); Christian v. Emison, 303 F.2d 52, 54-55 (5th Cir. 1962), cert. denied, 371 U.S. 920 (1962) (Holding no res judicata due to Supreme Court's overruling of the separate but equal doctrine in Brown v. Board of Education). Here, however, no constitutional issues are involved. Whatever rights the plaintiff still has,

he must pursue through direct appeal, not a second, similar cause of action. Jaffree v. Wallace, 837 F.2d 1461, 1469 (11th Cir. 1988).

The issue is an important one. Not only must the plaintiff first avoid the preclusive effect of the First Circuit's ruling, it must then persuade the First Circuit to revisit the issue. At this level, however, I am satisfied that the above analysis controls.

In accordance with the foregoing, the motion to dismiss is allowed and the complaint dismissed.

SO ORDERED.

/S/ A. David Mazzone
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA ex rel.
ROLAND A. LeBLANC,

Plaintiff,

CIVIL ACTION
No. 92-10999-MA

V.

RAYTHEON COMPANY,

Defendant.

ORDER OF DISMISSAL

MAZZONE, U.S.D.J.

In accordance with the Court's Memorandum and Order dated May 15, 1992, allowing the defendant's motion to dismiss (docket no. 30), it is hereby **ORDERED:**

The motion to dismiss is **ALLOWED.** The complaint is hereby **DISMISSED.**

By the Court,

May 18, 1992

[illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 92-1683

UNITED STATES OF AMERICA EX REL,
Roland A. LeBlanc,
Plaintiff, Appellant,

v.

RAYTHEON COMPANY,
Defendant, Appellee.

JUDGEMENT

Entered December 29, 1992

This cause came on to be heard on the briefs and the original record on appeal from the United States District Court of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed. Double costs awarded to the appellee.**

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

BY:/s/ Daniel F. [illegible]
Chied Deputy Clerk

(Messrs. Olenick & Sauber)

Per Curiam. Appellant LeBlanc's brought suit against appellee Raytheon Company brought under the False Claims Act, 31 U.S.C. 3729. In his complaint, he alleged that Raytheon defrauded the United States. The district court dismissed the complaint on res judicata grounds. We affirm the district court's judgment and award double costs to appellee. See United States ex rel. LeBlanc v. Raytheon Co., No. 92-10999 (D. mass. May 15, 1992).

Affirmed. Double costs to appellee.

Respectfully submitted,

ROLAND A. LeBLANC

By his Attorney,

PETER W. ADLER
Law Offices of Peter W. Adler
Five Commonwealth Road
Natick, Massachusetts 01760
(508) 650-0055

March 27, 1993

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA *ex rel.*
ROLAND A. LeBLANC

Petitioner,

v.

RAYTHEON COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. SAUBER
Counsel of Record
KENNETH S. KRAMER, P.C.
DOUGLAS W. BARUCH
MAUREEN C. SHAY
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Which Includes
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Counsel for Respondent
Raytheon Company

Balmar Legal Publishing Services, Washington, D.C., (202)682-9800

QUESTION PRESENTED

Whether the decision in *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), operates as a bar to the instant complaint under the principles of *res judicata* and collateral estoppel.

RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, Raytheon Company ("Raytheon") hereby advises the Court that its shares are publicly traded. Raytheon currently has no parent corporation, nor does it have any subsidiaries which have issued shares to the public. Raytheon has taken investment positions in three companies which have issued shares to the public: Beta Phase, Inc., PerSeptive Biosystems, Inc., and New Japan Radio Co., Ltd. (the latter has shares traded on the Tokyo Exchange).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 LISTING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER LEBLANC'S COMPLAINT WAS PROPERLY DISMISSED BASED ON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL	6
II. THE CASE PRESENTS NO CONFLICT AMONG THE CIRCUITS	8
III. THE CASE PRESENTS NO IMPORTANT OR SUBSTANTIAL QUESTION OF FEDERAL LAW	8
IV. DENIAL OF THE PETITION WOULD DISCOURAGE FORUM SHOPPING	9
V. OVERTURNING THE FIRST CIRCUIT DECISION WOULD UPSET THE FINALITY OF ALL FEDERAL DECISIONS	10
VI. THE DECISIONS AND PROCEEDINGS BELOW WERE ACCURATE AND FAIR	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	6
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)	11
Brown v. Felsen, 442 U.S. 127 (1979)	11
Cheeseman v. Carey, 485 F. Supp. 203 (S.D.N.Y. 1980)	9
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)	12
Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982)	11
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)	6
Diaz-Buxo v. Trias Monge, 593 F.2d 153 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979)	11
Dowd v. Soc'y of St. Columbans, 861 F.2d 761 (1st Cir. 1988)	10
Durfee v. Duke, 375 U.S. 106 (1963)	12
EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	6
Hadge v. Second Fed. Sav. & Loan Ass'n of Boston, 409 F.2d 1254 (1st Cir. 1969)	11
In Re Korean Air Lines Disaster 829 F.2d 1171 (D.C. Cir. 1987)	9
LeBlanc v. United States, 111 S. Ct. 1312 (1991)	4

LeBlanc v. United States,
112 S. Ct. 17 (1991) 4

Montana v. United States,
440 U.S. 147 (1979) 10, 12

Piper Aircraft v. Reyno, 454
U.S. 235 (1981) 9

Precision Air Parts, Inc. v. Avco Corp.,
736 F.2d 1499 (11th Cir. 1984), *cert. denied*,
469 U.S. 1191 (1985) 8, 12

Schmid Laboratories Inc. v. Hartford Acc. & Indem. Co., 654 F. Supp. 734 (D.D.C. 1986) 9

Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) 11

United States v. Moser, 266 U.S. 236 (1924) 12

United States ex rel. LeBlanc v. Raytheon Co.,
729 F. Supp. 170 (D. Mass. 1990) 3

United States ex rel. LeBlanc v. Raytheon Co.,
913 F.2d 17 (1st Cir. 1990) 3

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1404(a) 4, 7, 9, 10

28 U.S.C. § 1631 7

31 U.S.C. § 3729 *et seq.* 2

31 U.S.C. § 3730(e)(4) 3, 7

Other Authorities

Fed. R. Civ. P. 12(b)(6) 4, 5, 11

Fed. R. Civ. P. 41(b) 7

No. 92-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA *ex rel.*
ROLAND A. LeBLANC

Petitioner,

v.

RAYTHEON COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Raytheon Company ("Raytheon") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on December 29, 1992.

JURISDICTION

The First Circuit judgment affirmed the Massachusetts District Court's May 18, 1992 Order dismissing Petitioner's complaint on the basis of *res judicata* and collateral estoppel.

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the First Circuit decision.[1]

STATEMENT OF THE CASE

This case does not present any issue for which Supreme Court review is necessary or warranted. Rather, the only relevant issue is the application of the well-settled doctrines of *res judicata* and collateral estoppel to the particular facts of this case. The same District Court which handled the previous action determined that the second action was barred by the doctrines of *res judicata* and collateral estoppel, based on the facts presented. The United States Court of Appeals for the First Circuit, including two members who had served on the panel affirming the first dismissal, quickly and decisively affirmed the second dismissal on *res judicata* grounds, awarding double costs to Raytheon.

Now, Petitioner Roland LeBlanc ("Petitioner" or "LeBlanc") boldly seeks to have this Court review the facts not only of this case, but the identical facts of the prior action as well, notwithstanding the fact that this Court previously dispensed with the prior action on two occasions. In fact, this Petition for Writ of Certiorari constitutes the third time Petitioner has sought Supreme Court review of the previously dismissed claims. On the first two occasions, the Court denied certiorari and a subsequent request to revisit the issue. The same result is dictated here, where Petitioner merely has repackaged the identical claims in a second complaint.

A. LeBlanc I

A brief review of Petitioner's efforts in his prior litigation demonstrates that Petitioner fully litigated his positions and that

---

[1] Although it is not an issue in this appeal, Raytheon has maintained throughout the proceedings below that, pursuant to the provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, neither the District of Massachusetts, nor any federal court, has subject matter jurisdiction over this action.

the only proper issue in the instant case is the preclusive effect of the prior action. Petitioner filed his first False Claims Act (or "*qui tam*") action, *United States ex rel. LeBlanc v. Raytheon Co.*, No. 88-2363-T (D. Mass.) ("*LeBlanc I*"), on October 21, 1988. On January 25, 1990, the District of Massachusetts, per Judge Tauro, ruled that section 3730(e)(4) bars *qui tam* actions, such as Petitioner's, based on information discovered in the course of government employment.[2] *United States ex rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170 (D. Mass. 1990). On February 5, 1990, Petitioner specifically requested that Judge Tauro amend his ruling to dismiss the action, arguing that the Court's conclusion constituted a holding that the Court lacked statutory jurisdiction. Judge Tauro subsequently issued an Amended Order dismissing the complaint "because this *qui tam* suit is jurisdictionally barred by § 3730(e)(4) of the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*" *LeBlanc I*, 729 F. Supp. at 177-78.

Petitioner appealed and, on September 4, 1990, the First Circuit upheld the dismissal, stating that "a government employee in the same position as LeBlanc cannot qualify for the 'original source' exception to § 3730(e)(4)'s jurisdictional bar . . . ." *LeBlanc I*, 913 F.2d 17, 20 (1st Cir. 1990).

Petitioner filed his first petition for writ of certiorari in the United States Supreme Court on January 14, 1991, asking this Court to rule whether section 3730(e)(4) of the False Claims Act barred Petitioner's *qui tam* action against Raytheon based on knowledge he obtained in the course of his duties as a federal

---

[2] Petitioner based his allegations on observations he made while employed as a United States Defense Contract Administration Service ("DCAS") Quality Assurance inspector at a Raytheon facility in Massachusetts from November 1986 to November 1987. The United States declined to intervene in the lawsuit and litigated against Petitioner regarding the section 3730(e)(4) issue.

inspector. On March 18, 1991, the Supreme Court denied the petition. *LeBlanc v. United States*, 111 S. Ct. 1312 (1991).

On June 19, 1991, Petitioner sought leave to file a petition for rehearing in the Supreme Court. Petitioner argued that "intervening circumstances" justified the Supreme Court's reconsideration of its earlier denial of certiorari. The Supreme Court denied this request on August 17, 1991. *LeBlanc v. United States*, 112 S. Ct. 17 (1991)

B. LeBlanc II

On July 10, 1991, with his motion for rehearing still pending in the Supreme Court, Petitioner filed the instant Complaint ("*LeBlanc II*") in the United States District Court for the Middle District of Florida (Case No. 91-440-CIV-ORL-19). As determined by the District Court and affirmed by the Court of Appeals, the Complaint is identical in all material respects to the Complaint filed in *LeBlanc I*.[3] The United States declined to intervene in the action.

Raytheon moved to dismiss Petitioner's renewed action pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that his claims were barred by the doctrines of *res judicata* and collateral estoppel. In the alternative, Raytheon requested that the matter be transferred to the District of Massachusetts pursuant to 28 U.S.C. § 1404(a). Petitioner filed an opposition addressing both aspects of Raytheon's motion.

On April 21, 1992, the Middle District of Florida, per Judge Fawsett, granted Raytheon's motion to transfer, finding that "the connection between the subject matter of this lawsuit and the Middle District of Florida is virtually nonexistent" and criticizing Petitioner's "apparent attempt to manipulate the court system through forum shopping." Appendix to Petition ("App.") at

---

[3] On September 12, 1991, the United States filed a memorandum of points and authorities suggesting dismissal of *LeBlanc II* under the principle of *res judicata*. The court never ruled on this motion.

50, 54-55. Judge Fawsett transferred the entire case, including the pending Motion to Dismiss, to the District of Massachusetts.

On May 15, 1992, the District of Massachusetts dismissed the *LeBlanc II* complaint on the basis of *res judicata* and collateral estoppel. The Court compared the *LeBlanc I* complaint with the *LeBlanc II* complaint, finding that the second complaint, "though now of gigantic proportions, is identical in all material respects to the complaint filed in 1988 in the District of Massachusetts." App. at 59. The District Court held in relevant part:

> On the basis of this entire record, including the record of [*LeBlanc I*], the defendant's motion to dismiss is allowed and the complaint dismissed. . . . On this record the plaintiff is barred by principles of both res judicata and collateral estoppel. A final judgment was obtained in the first case; the case was decided by a court of competent jurisdiction; the parties are identical; the causes of action are identical; and the plaintiff has had a full and fair opportunity to present his claims to the district court and the court of appeals in this circuit.

App. at 62-63.

Petitioner again appealed to the First Circuit. The sole issue preserved on appeal was whether the District Court erred in dismissing the complaint under Rule 12(b)(6) on the basis of *res judicata* and collateral estoppel. After oral argument before Judge Torruella (author of the *LeBlanc I* First Circuit decision), Judge Bownes (member of the *LeBlanc I* panel), and Judge Stahl, the First Circuit, in a one paragraph *per curiam* decision, affirmed the dismissal on *res judicata* grounds and awarded double costs to Raytheon. App. at 69.

ARGUMENT

The Court should deny the petition for writ of certiorari for several reasons.

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER LEBLANC'S COMPLAINT WAS PROPERLY DISMISSED BASED ON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL

Petitioner virtually ignores the fact that the only issue in this case is the application of the well-settled doctrines of *res judicata* and collateral estoppel. Petitioner's discussion of these doctrines is relegated to the very end of his petition (Petition at 24) and Petitioner does not raise these issues at all in any of the "Questions Presented."[4] Yet, the *only* issue presented to the First Circuit for review and preserved for appeal is whether "this action [was] properly dismissed by the District Court on the basis of *res judicata* and collateral estoppel." Brief of Appellant (1st Cir. No. 92-1683) at 3. The remainder of the issues in LeBlanc's petition were not preserved on appeal and are not properly before the Court. The Court should therefore decline to address them. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981)(question raised in petition for certiorari but not raised in the Court of Appeals was not properly before the Supreme Court and was not considered).

In addition to the new theories raised in the "Questions Presented," Petitioner presents several arguments which were never presented, briefed or argued in any proceeding below:

---

[4] Specifically, Petitioner framed his "Questions Presented" to include issues such as (1) the propriety of the dismissal of both *LeBlanc I* and *LeBlanc II*, (2) whether the First Circuit courts had jurisdiction over both *LeBlanc I* and *LeBlanc II*, and (3) whether both *LeBlanc I* and *LeBlanc II* should be transferred to a federal court in Florida. Petition at i.

(1) whether the *LeBlanc I* District Court erred in permitting the United States to file an opposition to Petitioner's motion to strike the United States reservation of certain rights in its Notice of Declination. Petition at 3-4;

(2) whether dismissal based on the finding that a complaint is "jurisdictionally barred" under 31 U.S.C. § 3730(e)(4) is a voluntary dismissal without prejudice under Fed. R. Civ. P. 41(b) (Petition at 11-12);[5]

(3) whether 28 U.S.C. § 1631 requires a federal court to transfer a case to another forum with more favorable substantive law whenever dismissal is warranted under its own interpretation of the same law (Petition at 12-14);

(4) whether a federal court is prohibited from dismissing any case transferred to it pursuant to 28 U.S.C. § 1404(a) (Petition at 14-16, 18-20);

(5) whether the federal courts have the power to dismiss a *qui tam* action without the Attorney General's approval (Petition at 16-17); and

(6) whether, after transfer of the case to the District of Massachusetts, the Court could act on a motion that was pending in the Middle District of Florida at the time of the transfer (Petition at 20-24).

Even if any of these arguments had merit — which they do not — they are irrelevant to the *res judicata* issue on appeal and, since they were not raised below, are not properly before the Court.

---

[5] Petitioner now claims that the *LeBlanc I* dismissal was voluntary and without prejudice, so that he may refile the action anywhere at any time. This new assertion is belied by the fact that Petitioner specifically asked the Court to issue a final order dismissing that action so that Petitioner could appeal the dismissal and in fact, Petitioner immediately appealed. Moreover, Petitioner could not have proceeded in another forum after the Court found that he was an improper plaintiff under the statute.

II. THE CASE PRESENTS NO CONFLICT AMONG THE CIRCUITS

Resolution of *LeBlanc II* required only a straight-forward application of *res judicata* and collateral estoppel. The District of Massachusetts made a factual determination that the complaints in *LeBlanc I* and *LeBlanc II* are identical in all material respects and, therefore, the second complaint is barred. There is no conflict among the Circuits as to the application of these two well-settled principles.[6]

III. THE CASE PRESENTS NO IMPORTANT OR SUBSTANTIAL QUESTION OF FEDERAL LAW

This case presents no important federal statutory issues and, in fact, does not involve the interpretation of any federal statute. It is unnecessary to reach any False Claims Act issue in order to resolve the case. The only issue is the preclusive effect of *LeBlanc I*.

The application of *res judicata* and collateral estoppel turns solely upon an analysis of the particular facts involved and a comparison of the issues decided in the first case with those presented in the second. *See, e.g., Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1502 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) (determination of what claims were actually litigated is a factual question subject to the clearly erroneous standard). The decision that the present complaint is barred by these doctrines can by definition only affect the Petitioner and his repeated attempts to put forth the identical claims arising out of his government employment. The factual findings made by the courts below, including the District Court's findings that the complaints were identical for all material purposes and that all of the allegations arose out of the

---

[6] Any "conflict" among the circuits regarding the circumstances in which a government employee may file a *qui tam* suit under the False Claims Act is not presented in this case.

same factual circumstances, are the sole issues.[7] The appeal, therefore, will be of no consequence to other *qui tam* litigants or to the body of law interpreting the False Claims Act.

IV. DENIAL OF THE PETITION WOULD DISCOURAGE FORUM SHOPPING

There have been no procedural errors in *LeBlanc II* and the case presents no important federal jurisdictional issues. Instead, the procedural concerns Petitioner raises with respect to the transfer of the action from the Middle District of Florida to the District of Massachusetts are simply products of Petitioner's repeated attempts to manipulate the court system and "shop" among forums for a more favorable application of the law.

Petitioner admits that he filed his complaint in the Middle District of Florida to take advantage of Eleventh Circuit precedent he deemed favorable. Petition at 11. However, 28 U.S.C. § 1404(a) was intended to prevent exactly this type of forum shopping. *Cheeseman v. Carey*, 485 F. Supp. 203, 214 (S.D.N.Y. 1980). In such circumstances, the "Court cannot find that it is in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case." *Schmid Laboratories Inc. v. Hartford Acc. & Indem. Co.*, 654 F. Supp. 734, 737 (D.D.C. 1986).[8] Petitioner should not be heard to complain that his improper forum shopping efforts were unsuccessful.

---

[7] Petitioner admits that *all* of the allegations raised in *LeBlanc I* are reasserted in *LeBlanc II*. Petition at 6, 25.

[8] *See also In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175 (D.C. Cir. 1987) (federal venue provisions "are designed with geographical convenience in mind, and not to 'guarantee that the plaintiff will be able to select the law that will govern the case.'") (*citing Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 n.24 (1981)).

In addition, Petitioner mistakenly asserts that Raytheon "stipulated" to subject matter jurisdiction in Massachusetts, thereby precluding Raytheon's motion to dismiss. Petition at 18-19. As the Middle District of Florida recognized in its order granting Raytheon's motion to transfer, Petitioner's reasoning is fallacious:

> the requirement that a case [be] transferred only to a district where 'it could have been brought' should not operate to allow a plaintiff to avoid specific precedents or rulings by 'shopping' among different forums for the application of some particular view of the law. [citations omitted] Defendant's seemingly contradictory position is in reality a product [of] Plaintiff's apparent attempt to manipulate the court system through forum shopping and does not serve as grounds for preventing the transfer of this case to the appropriate forum.

App. at 54-55. Moreover, the District of Massachusetts dismissed *LeBlanc II* on the grounds of *res judicata* and collateral estoppel, not for lack of subject matter jurisdiction. Petitioner seems to argue that once a case is transferred pursuant to 28 U.S.C. § 1404(a), it can never be dismissed in the transferee court for any reason. Petition at 12-16. Even if this theory were properly before this Court — which it is not — it is without foundation and wholly unsupported.

V. OVERTURNING THE FIRST CIRCUIT DECISION WOULD UPSET THE FINALITY OF ALL FEDERAL DECISIONS

Under the doctrine of *res judicata*, "a final judgment on the merits bars the parties or their privies from relitigating issues that were or could have been raised in the first cause of action." *Dowd v. Soc'y of St. Columbans*, 861 F.2d 761, 763 (1st Cir. 1988); *see also Montana v. United States*, 440 U.S. 147, 153 (1979). *Res judicata* precludes multiple lawsuits on identical

claims between the same parties, and thereby "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court for resolution of other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). Overturning the dismissal based on *res judicata* and collateral estoppel would upset these long standing principles and frustrate the efficient administration of justice in our federal courts.

VI. THE DECISIONS AND PROCEEDINGS BELOW WERE ACCURATE AND FAIR

Finally, the decisions below should remain undisturbed because the District of Massachusetts and the First Circuit fully considered and correctly decided the issues in *LeBlanc II*. The well settled principles of *res judicata* and collateral estoppel clearly bar Petitioner's present action and, as the First Circuit emphatically held, the District Court properly dismissed the complaint on those grounds.

First, a Rule 12(b)(6) motion was the proper vehicle for raising the *res judicata* and collateral estoppel issues. *Diaz-Buxo v. Trias Monge*, 593 F.2d 153, 154 (1st Cir.), *cert. denied*, 444 U.S. 833 (1979); *Concordia v. Bendekovic*, 693 F.2d 1073 (11th Cir. 1982). Consideration of the prior record in this case was both appropriate and necessary. *Concordia*, 693 F.2d at 1076.

Second, *res judicata* and collateral estoppel apply to the jurisdictional issue presented and decided in *LeBlanc I*. *See Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982), *citing American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932); *Hadge v. Second Fed. Sav. & Loan Ass'n of Boston*, 409 F.2d 1254, 1257 (1st Cir. 1969). As this Court has held, the district courts have the authority:

> to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to

> act. Their determination of such questions, while open to direct review, may not be assailed collaterally.

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940).[9]

Finally, the District Court conducted a comparison of the two long and complex complaints and made a factual finding that they were identical in all material respects. All of the requirements of *res judicata* and collateral estoppel are met: a final judgment was obtained in *LeBlanc I*, the parties and causes of action were identical, and Petitioner had a full and fair opportunity to litigate his claims in both the District Court and the Court of Appeals. App. 62-63.

Moreover, as the District Court held, the *LeBlanc I* decision "is still valid and is therefore controlling in this case and binding on this Court, despite any rulings to the contrary in other circuits." App. at 63-64. The general rule is that "changes in the law after a final judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled." *Precision Air Parts Inc.*, 736 F.2d at 1503. As this Court has held, "a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Montana v. United States*, 440 U.S. 147, 162 (1979) (*citing United States v. Moser*, 266 U.S. 236, 242 (1924)).

---

[9] *See also Durfee v. Duke*, 375 U.S. 106, 116 (1963) (where "jurisdictional issues had been fully and fairly litigated by the parties and finally determined in [the first court], the [second court] was correct in ruling that further inquiry was precluded").

CONCLUSION

For these reasons, respondent Raytheon Company respectfully requests that the petition for a writ of certiorari be denied.

April 30, 1993

Respectfully submitted,

Richard A. Sauber
Counsel of Record
Kenneth S. Kramer, P.C.
Douglas W. Baruch
Maureen C. Shay
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Which Includes
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Counsel for Respondent
Raytheon Company